MEMORANDUM OF LAW

TITLE: Consideration of Contentions, based on Evidence presented, to reopen *800 SERVICES, INC. v. AT&T CORP.*, U.S. District Court for the District of New Jersey, Civil Action No. 98-1539.

REQUESTED BY: Mr. Phillip Okin

DATE SUBMITTED: February 28, 2006

PRELIMINARY STATEMENT

The federal case, *800 Services, Inc. v. AT&T Corp.*, No. 98-1539 (D.N.J. Aug. 28, 2000), *aff'd*, 2002 WL 215625 (3d Cir. Feb. 12, 2002) ("subject case"), has been CLOSED for more than five years. 800 Services, Inc. ("800 Services") was an "aggregator" of defendant AT&T Corporation's ("AT&T") telecommunications services, i.e., 800 Services subscribed to certain AT&T high-volume discount plans and pooled the usage of its customers to satisfy the minimum volume commitments of the AT&T service plan. Since AT&T is a common carrier within the meaning of the federal Communications Act of 1934 it offers its services under certain tariffs, which define its duties.

800 Services filed the subject case against AT&T claiming various wrongdoing, as detailed *infra*, and AT&T counterclaimed for, *inter alia*, various fees known as "shortfall and termination penalties". The U.S. District Court granted summary judgment to AT&T on all of the claims made by 800 Services, and also granted summary judgment for AT&T on its counterclaim for, *inter alia*, shortfall and termination penalties. 800 Services, Inc. appealed, and the Third Circuit affirmed. *See 800 Services, Inc. v. AT&T Corp.*, No. 98-1539 (D.N.J. Aug. 28, 2000), *aff'd*, 2002 WL 215625 (3d Cir. Feb. 12, 2002). A copy of the Complaint in the subject case is annexed hereto as Exhibit "1". A copy of the docket sheet for the subject case is annexed

hereto as Exhibit "2". A copy of the District Court decision, *800 Services, Inc. v. AT&T Corp.*, No. 98-1539 (D.N.J. Aug. 28, 2000), granting summary judgment is annexed hereto as Exhibit "3". A copy of the Third Circuit decision affirming the District Court, *800 Services, Inc. v. AT&T Corp.*, 2002 WL 215625 (3d Cir. Feb. 12, 2002), is annexed hereto as Exhibit "4".

Mr. Phillip Okin is President of 800 Services. Mr. Alfonse Inga is the owner of several companies which were in the same line of business as *800 Services, Inc.*; namely, Winback & Conserve Program, Inc., One Stop Financial, Inc., Group Discounts, Inc. and 800 Discounts, Inc. ("Inga companies"). The Inga companies are currently plaintiffs in pending litigation in the District of New Jersey against AT&T Corp., which is similar to the subject case; namely, *Combined Companies, Inc. v. AT&T Corp.*, No. 95-90G8 (D.N.J. Feb. 24, 1995). A copy of the docket in the *Combined Companies, Inc.,* is annexed hereto as Exhibit "5".

The *Combined Companies, Inc.* case has been stayed for several years ever since a legal issue was referred to the Federal Communication Commission ("FCC"). *See* Exhibit "5". The FCC issued a decision, which was later vacated by the Court of Appeals for the District of Columbia. Said FCC decision is annexed hereto as Exhibit "6", and said Court of Appeals decision is annexed hereto as Exhibit "7". At present, a motion to vacate the stay in *Combined Companies, Inc. v. AT&T Corp.*, No. 95-908 (D.N.J. Feb. 24, 1995) is being litigated. *See* docket of No. 95-908 (D.N.J. Feb. 24, 1995), at pp. 10-14, which is annexed hereto as Exhibit "5". The Inga Companies contend that the stay in the District of New Jersey should be lifted, while AT&T contends that the Inga Companies must obtain a new ruling from the FCC.

In AT&T's brief, filed on or about June 13, 2005, in opposition to said motion to vacate the stay in *Combined Companies, Inc.*, AT&T cited the subject case for the principle that shortfall charges are a significant obligation under the subject tariff, which require a ruling from

the FCC, as follows:

> Plaintiffs' other attempts to downplay the significance of shortfall charges miss the mark. Their claim that Judge Politan had found that shortfall and termination obligations are "illusory" (Ptf. Brf at 12 n.4), mischaracterizes this Court's previous statements. As both this Court and the D.C. Circuit recognized, whether the CCI-PSE transfer request complied with AT&T's tariff depended on whether PSE had agreed in writing to assume all obligations. The claim that shortfall charges are not a genuine obligation ignores the tariff's language, statutory and regulatory requirements, and court decisions, including one by Judge Politan in 2000, awarding AT&T shortfall charges incurred under its tariffs. *See Telecom Int'l America, Ltd. v. AT&T Corp.*, 67 F. Supp.2d 189, 221 (S.D.N.Y. 1999) (granting summary judgment for shortfall charges); *800 Services, Inc. v. AT&T Corp.*, Civil Action No. 9801539, (D.N.J. Aug. 28, 2000) (awarding approximately $1.3 million in shortfall charges) (Politan, J.), *aff'd*, 2002 WL 2155625 (3d Cir. Feb. 12 2002).

Brief of AT&T in opposition to plaintiffs' motion to vacate stay, (doc. no. 126), p. 15 (a copy is annexed hereto as Exhibit "8") (emphasis added).

The Inga Companies responded as follows to AT&T's argument:

> Finally, the two cases cited by AT&T in support of its position, *Telecom Int'l America, Ltd. v. AT&T Corp.*, 67 F. Supp. 2d 189 (S.D.N.Y. 1999) and *800 Services, Inc. v. AT&T Corp.*, Civil Action No. 98-1539 (D.N.J. Aug. 28, 2000), aff'd, 2002 WL 215625 (3d Cir. Feb. 12, 2002) actually support plaintiffs. In *800 Services Inc.*, Judge Politan ruled that only newly ordered plans after June 1994 were subject to S&T obligations. Thus, 800 Services, Inc.'s plans were subject to S&T obligations while plaintiffs' plans were not. Second, it is significant that neither case involved the FCC.

Brief of Inga Companies in support of plaintiffs' motion to vacate stay, (doc. no. 127, p. 11) (a copy is annexed hereto as Exhibit "9") (emphasis added). Actually, a reading of Judge Politan's decision in the subject case does not indicate that he "ruled that only newly ordered plans after June 1994 were subject to S&T obligations"; instead, as noted *infra*, he merely stated "the allegations of the Complaint concern service to which 800 Services subscribed after August 1, 1994." *See 800 Services, Inc. v. AT&T Corp.*, No. 98-1539 (D.N.J. Aug. 28, 2000), *aff'd*, 2002 WL 215625 (3d Cir. Feb. 12, 2002) (emphasis added) (Exhibit "3", p. 8).

In any event, after AT&T cited the subject case, Mr. Inga contacted Mr. Okin and now raises a number of contentions that the subject case should be reopened. Mr. Inga has produced a fifty-one page document summarizing these contentions, which is annexed hereto as Exhibit "10". This document was revised a number of times, and the final revision of Mr. Inga's statement was only emailed on February 23, 2006. Certain other documents which were requested were not produced.

Mr. Inga now contends, *inter alia*, that the District Court erred in the subject case by holding that 800 Services was subject to shortfall and termination penalties because 800 Services' plans were actually purportedly ordered before June 17, 1994, and were therefore "grandfathered" on a previous tariff, as follows:

> What happened in the 800 Services, Inc. case before Judge Politan is that Judge Politan never had to understand which paper work gets filled out by an aggregator and what boxes are selected etc. This is because the Inga Companies plans traffic only was attempted to be transferred in Jan of 1995 and the plans had not been restructured between June 17th 1994 and Jan of 1995. Therefore the Court never needed to understand how an aggregator through the paper work maintains its grandfathered status.

Inga Statement, p. 41 (Exhibit "10") (emphasis added).

This memorandum of law will analyze the contentions and evidence presented by Mr. Okin and Mr. Inga, as summarized in Mr. Inga's Statement (Exhibit "10") to determine whether they warrant the reopening of the subject case under current law. The gravamen of said contentions is based on the following types of allegations: (1) newly discovered evidence; (b) fraud; (c) misapplication of law by District Court and Third Circuit; and possibly (d) change of law.

Note: all of the following are beyond the scope of this memorandum: (a) considering any contentions based on evidence which has not been presented; (b) speculating on the

existence of any evidence which has not been obtained; (c) proposing any strategy for obtaining additional evidence.

QUESTION PRESENTED

Are any of the contentions made by Mr. Inga and Mr. Okin to reopen the subject federal case, which has been closed for over five years, warranted by existing law, based on the evidence presented and summarized in Mr. Inga's Statement (Exhibit "10")?

BRIEF ANSWER

No. Fed. R. Civ. P. 60(b) controls whether a federal civil case can be reopened.

First, those contentions for reopening which are based on "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)", or are based on "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party" are barred by the one year time limit of Fed. R. Civ. P. 60(b) which expressly mandates that any such motions be made "not more than one year after the judgment, order, or proceeding was entered or taken".

Second, those contentions which are based on a misapplication of law or change of law are not deemed grounds for reopening a closed case, pursuant to Fed. R. Civ. P. 60(b). *See, e.g., Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 628-29 (7th Cir. 1997) (incorrect interpretation of law by federal court did not justify relief from federal judgment under Fed. R. Civ. P. 60(b)).

Third, those contentions which allege fraud do not meet the very demanding standard for fraud on the court, set forth by the Third Circuit in *Herring v. United States*, 424 F.3d 384 (3d Cir. 2005) (holding that "only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated,

will constitute a fraud on the court") (quoting *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978) (emphasis added)).

Moreover, to some extent these contentions are based on a misunderstanding of the fundamental workings of the common law system, itself, which accepts as necessary evils each of the following:

- the possibility of inconsistent results in different cases;
- the possibility of a change in the law without reversing judgments which were rendered prior to the change;
- as well as erroneous decisions by courts which are not corrected on appeal.

STATEMENT OF FACTS

A. Background

The pertinent background--summarized by the District Court--is as follows:

1. Plaintiff 800 Services[, Inc.] (hereinafter "800 Services"), a Corporation organized under the laws of the State of New Jersey, was engaged in the telecommunications business as an 'aggregator' of defendants AT&T Corporation's '800' telecommunications services. *See* Complaint, ¶¶1, 5-9.

2. As an aggregator, 800 Services subscribed to certain AT&T high-volume discount plans and pooled the usage of its customers to satisfy the minimum volume commitments of the AT&T service plan. See id.

3. 800 Services owned no telecommunications facilities of its own and was AT&T's customer of record for the services to which it subscribed. See Id. In turn, the customers whose usage 800 Services aggregated were direct customers of 800 Services, not of AT&T. See id., ¶10.

4. Defendant AT&T Corporation (hereinafter "AT&T") provides interstate long-distance telecommunications service in competition with MCI, Sprint, and many other long-distance carriers and is a "common carrier" within the meaning of the federal Communications Act of 1934.

5. Interstate telecommunications carriers are regulated by the [Federal Communications Commission] ("FCC") pursuant to Title II of the

Communications Act of 1934, as amended. *See* 47 U.S.C. § 201, et seq. (West 2000).

6. Because AT&T provides long distance telecommunications services as a "common carrier" it falls within the purview of the Communications Act. *See* 47 U.S.C. § 153(10; 47 U.S.C. § 201, et seq. (West 2000). As such, it is required to provide its services to any person upon reasonable request on terms that are just, reasonable, and nondiscriminatory. *See* 47 U.S.C. § 201; 47 U.S.C. § 202(a) (West 2000).

7. The duties owed by common carriers are regulated through tariffs. Pursuant to § 203, a common carrier such as AT&T, is required to file 'schedules' with the FCC, commonly referred to as 'tariffs,' 'showing all charges' for its services and 'the classifications, practices, and regulations affecting such charges.' 47 U.S.C. § 203(a) (West 2000)."

8. Thus, pursuant to the 'filed rate doctrine/filed tariff doctrine,' the filed rates are binding on both the carrier and the public.

9. Despite the fact that strict adherence to the filed rate/filed tariff doctrine oftentimes produces harsh results, it is the operative doctrine to be applied by the courts.

10. In 1991, the FCC adopted rules and regulation authorizing carriers to establish "contract tariffs" with their customers. A contract tariff contains individually negotiated and tailored services arrangements reached between a common carrier and its customer.

11. [I]n order not to violate the Act's prohibition against discrimination, the carrier must then make the contract tariff generally available to other similarly situated customers. See id. (citing Interstate Interexchange Marketplace at ¶¶91, 129).

12. In this matter, pursuant to Tariff No. 2, AT&T offered 'inbound' or '800' long-distance telecommunications services and certain discount plans for such services, including 'Customer Specific Term Plan II" (hereinafter "CSTP II").

13. A customer subscribes to AT&T's CSTP II Plan by executing a Network Services Commitment Form. Under the tariff, AT&T bills the aggregator's individual locations for their portion of the usage under the plan. However, Tariff No. 2 provides that AT&T's customer of record (the aggregator in this case) assumes all financial responsibility for all of the designated accounts aggregated under the customer's CSTP II Plan and that, in the event any of these accounts is in default of payment, AT&T will reduce the plan discount payable to the AT&T customer in the amount of that default. See id., Tariff No. 2, §3.3.1.Q.

14. Tariff No. 2 further provides that the customer will incur "shortfall" charges in the event that it does not satisfy its Minimum Revenue Commitment and "termination" charges if it discontinues service before the completion of the term. *See id.*

15. Tariff No. 2 also provides that, in the event any shortfall or termination charges are incurred under a CSTP II Plan, such charges shall be apportioned among the accounts aggregated under the plan according to usage and billed to the individual aggregated locations designated by the customer. See id.

See 800 Services, Inc. v. AT&T Corp., No. 98-1539 (D.N.J. Aug. 28, 2000), *aff'd*, 2002 WL 215625 (3d Cir. Feb. 12, 2002) (Exhibit "3", pp. 2-7) (emphasis added) (some citations omitted).

B. Pertinent Facts

The pertinent facts which the District Court found are as follows:

1. 800 Services subscribed to inbound service offered by AT&T pursuant to Tariff No. 2 from 1990 through 1994. However, the allegations of the Complaint concern service to which 800 Services subscribed after August 1, 1994.

2. On or about July 22, 1994, Phillip Okin (hereinafter "Okin"), President of 800 Services, executed a Network Services Commitment Form for AT&T's CSTP II Plan.

3. On August 2, 1994, Scott Landon, on behalf of AT&T, executed the Network Services Commitment Form.

4. During his deposition, Okin testified that, in or about Fall 1994, his business began declining. See Deposition of Phillip Okin at page 50, lines 11-13.

5. In or about November to December 1994, 800 Services discontinued adding new customers to its CSTP Plan. *See* Okin Dep. at page 144, lines 5-11.

6. At some point shortly thereafter, 800 Services was unable to meet its minimum revenue commitment under its CSTP Plan for the first year of the third-year term. *See* Okin Dep. at page 139, lines 1-11.

7. The record reveals that Okin then embarked upon a series of 'strategies' seemingly aimed at avoiding the shortfall charges which, incidentally, Okin believed he did not have to pay. *See* Okin Dep. at page 166, lines 3-10.

8. The first strategy was to request that AT&T extend the term of its commitment under its August 1, 1994 plan pursuant to Section 2.5.7 of Tariff No. 2.

9. In or about July 21, 1995, 800 Services then attempted to 'restructure' its CSTP II Plan. By letter dated July 25, 1995, AT&T responded to 800 Services's request to restructure its CSTP II Plan and outlined the terms and conditions specified under Tariff No. 2 that were applicable to this request. *See* Solomon Cert., Exhibit I. Specifically, AT&T advised 800 Services that under the tariff, if 800 Services restructured its existing CSTP II Plan, 800 Services would remain liable under the tariff for any shortfall charges accrued in the first year of its plan and, in the event that 800 Services failed to satisfy its Minimum Annual Commitment for the first year of the existing plan, it would also be required to repay the promotional credits paid to 800 Services under the plan. *See id.* AT&T advised 800 Services to notify it if 800 Services wished to proceed with this request. See id. 800 Services never attempted to proceed with this request. *See* Okin Dep. at page 94, line 7-10. In fact, Okin testified that 800 Services did not qualify for a restructuring of its plan under the terms of the governing tariff. *See* Okin Dep. at page 134, lines 7-11.

10. 800 Services next contemplated moving certain business traffic from its Tariff No. 2 service to CT 516. Notwithstanding 800 Services's [sic] allegations in its Complaint, 800 Services has admitted in discovery that it did not qualify to subscribe directly to CT 516 and that 800 Services never actually submitted an order to AT&T for service to CT 516 or under any other contract tariff or to transfer service from Tariff No. 2 to CT 516. *See* Okin Dep. at pages 101-105.

11. Finally, in or around July 28, 1995, 800 Services submitted orders to AT&T to delete all its end-user locations from its CSTP II Plan. *See* Okin Dep. at page 104. At the time that 800 Services asked to delete all its customers from its plan, 800 Services had no arrangements to transition those customers to any other 800 Services's [sic] plan or to any other telecommunications service for inbound 800 Service. *See* Okin Dep., at page 157, lines 14-22; page 158, lines 22-25; page 159, line 1.

12. On or about April 1, 1996, AT&T rendered a bill to 800 Services in the amount of $382,651.05 allegedly due and owing for usage charges for inbound telecommunications services provided to 800 Services by AT&T pursuant to Tariff No. 2.

See 800 Services, Inc. v. AT&T Corp., No. 98-1539 (D.N.J. Aug. 28, 2000), *aff'd*, 2002 WL 215625 (3d Cir. Feb. 12, 2002) (Exhibit "3", p. 8-12) (emphasis added) (some citations

omitted).

PROCEDURAL HISTORY

Since the issue addressed by this memorandum concerns the re-opening of a closed case, it is important to carefully review the procedural history of this closed case in detail.

A. Summary of Procedural history

800 Services filed a Complaint in the U.S. District Court for the District of New Jersey on April 6, 1998, containing twelve counts. *See 800 Services, Inc. v. AT&T Corp.*, No. 98-1539 (D.N.J. Aug. 28, 2000), *aff'd*, 2002 WL 215625 (3d Cir. Feb. 12, 2002) (Exhibit "3", p 12). On or about June 30, 1998, AT&T filed an Answer and Counterclaim. *See id.*

800 Services stipulated with AT&T on or about February 5, 1999, to dismiss Counts One, Two, Three, and Ten of the complaint, and an Order was entered dismissing said Counts on August 12, 1999. *See id* (Exhibit "3", p. 2, n.1) (citing Stipulation of Dismissal and Order dated February 5,1999; Order dated August 12, 1999).

On or about August 28, 2000, the District Court granted summary judgment against 800 Services on all remaining counts, and thereby dismissed with prejudice Counts Four, Five, Six, Seven, Eight, Nine, Eleven, and Twelve. The District Court also granted summary judgment for AT&T on its counterclaim in the amount of $1,782,649.60 plus pre-judgment interest, and ordered the case CLOSED. *See id* (Exhibit "3", p. 25). The final judgment in the subject case was entered on or about September 18, 2000. *See* docket (doc. no. 53) (Exhibit "2", p. 6).

The case was timely appealed to the Third Circuit, and the Third Circuit affirmed the District Court's decision in its entirety. *800 Services, Inc. v. AT&T Corp.*, 2002 WL 215625 (3d Cir. Feb. 12, 2002) (Exhibit "4").

B. District Court Summary Judgment Dismissal

1. Dismissal of Count Four (Unjust Enrichment).

The District Court summarized 800 Service's contentions regarding Count Four (Unjust Enrichment) as follows: "800 Services contends that AT&T became unjustly enriched at its expense when AT&T utilized 800 Service's proprietary customer lists to derive profits without apportioning the profits." *800 Services, Inc. v. AT&T Corp.*, No. 98-1539 (D.N.J. Aug. 28, 2000), *aff'd*, 2002 WL 215625 (3d Cir. Feb. 12, 2002) (Exhibit "3", p 17). The District Court held:

> Quite simply, there is no first-party testimony that AT&T appropriated 800 Services' customers.
> ...
> Additionally, contrary to what 800 Services would have this Court believe, nothing in Chris Mehlenbacher or Susan Rinaldi's (employees of 800 Services) deposition testimony provides a factual basis for 800 Service's conclusion that AT&T was utilizing its proprietary information.
> ...
> 800 Services also alleges that AT&T wrongfully collected revenue from end-user customers without giving 800 Services its share of the profits. However, 800 Services offers no evidence to support this allegation.

Id. (Exhibit "3", pp. 17-19).

2. Dismissal of Counts Five and Six (Slander and Libel).

With respect to Counts Five and Six, the District Court noted "The latest point in time within which it is alleged that AT&T made slanderous or libelous statements is July 1995." Since the Complaint was filed on April 6, 1998, the District Court held that said Counts were barred by the one year statute of limitations, pursuant to N.J.S.A. §2A:14-3. *See Id.* (Exhibit "3", p. 16).

3. Dismissal of Counts Seven and Eight (Intentional Interference with Prospective Economic Advantage and Intentional Interference with Contractual Relations).

The District Court noted that "Counts Seven and Eight of Services's [sic] Complaint

purport to allege claims of intentional interference with prospective economic advantage and intentional interference with contractual relations." *See Id.* (Exhibit "3", p. 19). The District Court grouped this claim into three separate groups of contentions.

The District Court summarized the first contention as follows:

> 800 Services contends that AT&T wrongfully solicited 800 Services's [sic] customers, thereby causing 800 Services's [sic] business to decline. Specifically, 800 Services contends that AT&T called 800 Services's customers, offered lower rates than those offered by 800 Services, and told these customers that it would remove any shortfall charges assessed to them if they would switch to AT&T.

See Id. (Exhibit "3", p. 21). The District Court held that the alleged actions were not wrongful, as follows:

> As aforementioned, there is no reliable, first-party testimony in the record that AT&T wrongfully solicited 800 Services's customers. Even assuming that AT&T contacted 800 Services's customers and advised those customers that AT&T disconnected 800 Services, that a customer could complete calls on the AT&T network at AT&T's standard rates, that a customer may also choose any long-distance carrier, and that a customer may want to consider direct service with AT&T as an alternative to no service at all (since Okin testified that there was no alternative plan in place post-deletion), such conduct does not strike this Court as 'wrongful' conduct on the part of AT&T. This is because these statements allegedly occurred after 800 Services began defaulting on its payment obligations and, ultimately, placed these customers in the position of having no 800 service plan at all.

See Id.

The District Court summarized the second contention as follows:

> 800 Services also contends that AT&T tortiously interfered with its business when AT&T refused to allow 800 Services to restructure its plan.

See Id. (Exhibit "3", p. 20). The District Court held that this contention did not have legal merit based on the testimony of 800 Services' president, Mr. Okin, as follows:

> Further, 800 Services's [sic] allegation that AT&T wrongfully refused its request to restructure is belied by the testimony if [sic] its President. The record reveals that AT&T responded to 800 Services's request to restructure its CSTP II Plan and outlined the terms and conditions specified under Tariff No. 2 that were

applicable to this request. *See* Solomon Cert., Exhibit I. Specifically, AT&T advised 800 Services that under the tariff, if 800 Services restructured its existing CSTP II Plan, 800 Services would remain liable under the tariff for any shortfall charges accrued in the first year of its plan and, in the event that 800 Services failed to satisfy its Minimum Annual Commitment for the first year of the existing plan, it would also be required to repay the promotional credits paid to 800 Services under the plan. *See id.* AT&T advised 800 Services to notify it if 800 Services wished to proceed with this request. See id. 800 Services never attempted to proceed with this request. See Okin Dep. at page 94, lines 7-10. In fact, Okin testified that 800 Services did not qualify for a restructuring of its plan under the terms of the governing tariff. *See* Okin Dep. at page 134, lines 7-11.

See Id. (Exhibit "3", pp. 21-22) (emphasis added).

The District Court summarized the third contention as follows:

800 Services proffers many allegations to support its tortious interference claims. However, many of these allegations should have been asserted pursuant to the Communications Act.

See Id. (Exhibit "3", pp. 21). The District Court held that this group of allegations were time-barred, as follows:

Since the Court has already determined that any claims brought pursuant to the Communications Act are time-barred, the Court will not address these allegations.

See Id. (Exhibit "3", pp. 21-22).

4. Dismissal of Counts Nine (Unfair Competition/Trade Libel).

The District Court summarized 800 Services' contentions regarding Count Nine, as follows: "800 Services argues that AT&T told 800 Services' customers that 800 Services was 'not responsible in their business matters.'" *See Id.* (Exhibit "3", p. 23). The District Court dismissed Count Nine, holding "In conclusion, 800 Services has not offered any admissible evidence which demonstrates that AT&T made false statements concerning 800 Services, its property or business." *See Id.*.

5. Dismissal of Counts Eleven and Twelve (§§ 201, 202, and 203 of the Communications Act).

With respect to Counts Eleven and Twelve, the District Court noted: "Counts Eleven and

Twelve of 800 Services' Complaint purport to allege claims arising under §§ 201, 202, and 203 of the Communications Act." *See Id.* (Exhibit "3", p. 13). The District Court held that Counts Eleven and Twelve were barred by the two year statute of limitations, pursuant to Section 415(b) of the Communications Act, since "the most recent violation occurred no later than July 1995, which is more than two years prior to the filing of the Complaint." *See Id.* (Exhibit "3", pp. 13-15).

The District Court held that 800 Services' contention that its claims brought pursuant to the Communications Act were not time-barred by the two-year statute of limitations by virtue of the "continuing wrong" doctrine was not valid because the "'continuing wrong' doctrine applies in situations where there is evidence of continuing **affirmative** wrongful conduct", and "continuing to be 'unjustly enriched' [as 800 Services contended] does not qualify as an affirmative act". *See Id.* (Exhibit "3", pp. 15-16) (emphasis in original).

C. Third Circuit Affirmance

As a preliminary matter, the Third Circuit expressly found that:

> A contract between the parties required 800 Services to compensate AT&T for any shortfall between the anticipated volume of usage and the actual volume of services provided by AT&T.

800 Services, Inc. v. AT&T Corp., 2002 WL 215625 (3d Cir. Feb. 12, 2002) (Exhibit "4", p. 1) (emphasis added).

First, with respect to the "allegations under the Federal Communications Act" (Counts Eleven and Twelve, and parts of Counts Seven and Eight), the Third Circuit affirmed the District Court holding that "their prosecution was barred by the applicable statute of limitations." *See id.* (Exhibit "4", p. 2). The Third Circuit expressly adopted the District Courts reasoning regarding the continuing wrong doctrine, as follows:

> 800 Services argues, however, that although the most recent alleged violation of the Communications Act occurred more than two years prior to the complaint, the claims are not barred due to the continuing wrong doctrine. The continuing wrong doctrine applies to toll the statute of limitations if there is continuing affirmative wrongful conduct. *See Brenner v. Local 514, United Broth. of Carpenters and Joiners of America*, 927 F.2d 1283, 1296 (3rd. Cir. 1991); *see also 287 Corporate Center Associates v. Township of Bridgewater*, 101 F.3d 320, 324 (3rd Cir. 1996) (not applying the doctrine when there was no affirmative act by the defendant within the statutory period). The District Court correctly found the doctrine inapplicable in this matter because there was no continuing affirmative wrongful conduct during the statutory two year period prior to 800 Services filing of the complaint.

See id. (emphasis added).

Second, the Third Circuit affirmed the District Court with respect to Counts Five and Six (Slander and Libel), as follows:

> The District Court correctly characterized the statements at issue as slander and libel, not as trade libel. The statements did not constitute trade label since there is no evidence that AT&T made any false statements regarding 800 Services or its affairs. As such, 800 Services' claims sound in slander and libel which are barred by the statute of limitations.

See id..

Third, with respect to Count Four (Unjust Enrichment), the Third Circuit affirmed the District Court's holding that "800 Services offered no admissible evidence in support of this contention and that the deposition testimony was based on speculation, conjecture and industry 'buzz.'" *See id.* Further, the Third Circuit held that the additional arguments presented in 800 Services' appellate brief were not persuasive, as follows:

> Plaintiff's brief on appeal does allege that AT&T would not have been able to switch customers from 800 Services's accounts to AT&T's without abuse of the customer lists. However, the brief does not set forth any causal connection between the customer list abuse and the switching of telecommunications providers. An individual consumer's choice to switch providers could be based on a number of different factors and, therefore, does not necessarily evidence any impropriety on the part of AT&T.

See id.

Fourth, with respect to the remaining parts of Counts Seven and Eight (Intentional Interference with Prospective Economic Advantage and Intentional Interference with Contractual Relations), the Third Circuit affirmed the District Court's grant of summary judgment, as follows:

> Similarly, the District Court found a lack of evidence in support of 800 Services's tortious interference claims. Although 800 Services presumptively argues on appeal that the business would have continued to flourish but for AT&T's actions, it offers no details to support that contention.

See id.

Further, in affirming the District Court's grant of summary judgment to AT&T on its counterclaim, the Third Circuit found:

> The agreement between the parties was controlled by the Tariff No. 2. Tariff No. 2 requires that the aggregator pay the provider for usage and shortfall charges. 800 Services has not contested incurring usage charges or the amounts thereof. Rather, 800 Services claims that AT&T violated an implied covenant of good faith and fair dealing in the contract execution. As discussed above, the District Court found a lack of evidence of slander, libel and tortious interference. Accordingly, we find that the District Court did not err in awarding damages for unpaid usage and shortfall charges to AT&T. These counterclaim defenses offered by 800 Services mirror the claims offered in the complaint; the defenses similarly lack the requisite evidentiary foundation.

See id. (Exhibit "4", pp. 2-3). (emphasis added).

DISCUSSION

To begin with, it is important to understand that attempting to reopen a federal case which has been closed for over five years is a serious matter, and any contentions in support of re-opening must be carefully reviewed in light of the law which applies to re-opening a closed case. Moreover, attempting to reopen a federal case may result in the imposition of sanctions against the proponent of a motion to reopen if the motion is not warranted by existing law.

I. APPLICABLE LAW REGARDING RE-OPENING OF A FEDERAL CIVIL CASE

First, it is important to understand our starting point: there is a final judgment on the merits which has been entered in the subject case. *800 Services, Inc. v. AT&T Corp.*, No. 98-1539 (D.N.J. Aug. 28, 2000), *aff'd*, 2002 WL 215625 (3d Cir. Feb. 12, 2002) (Exhibit "3"). A litigant, such as 800 Services, is not permitted to get "two bites at the apple": therefore, as the Supreme Court has repeatedly recognized, the doctrine of *res judicata* bars the re-litigation of the same claims by the same parties, and *collateral estoppel* bars the re-litigation of the same issues by the same parties:

> Under the doctrine of *res judicata*, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979).

Therefore, in order for 800 Services to relitigate the claims in the subject case against AT&T, it would be necessary to reopen the judgment, which is controlled by Fed. R. Civ. P. 60(b).

A. FED. R. CIV. P. 60

Fed. R. Civ. P. 60(b) states:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.**
>
> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based

> has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Fed. R. Civ. P. 60(b) (emphasis added).

Note that Fed. R. Civ. P. 60(b) expressly states that "[t]he motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken"; hence, each of the following must be brought not more than one year after the judgment:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party....

See Fed. R. Civ. P. 60(b) (emphasis added).

Therefore, since the final judgment was entered on or about September 18, 2000 (*see* docket, doc. no. 53, Exhibit "2", p. 6), i.e., more than five years have passed since the entry of the final judgment, each of the basis for re-opening this case stated in Fed. R. Civ. P. 60(b) (1), (2), and (3) are time barred by the plain meaning of Fed. R. Civ. P. 60(b).

Second, Fed. R. Civ. P. 60(b) (6), i.e., "any other reason justifying relief from the operation of the judgment", is tantamount to a "none of the above" provision, which refers to a

reason other than those contained in the five enumerated grounds on which a court may grant a Rule 60(b) motion, so that a motion based on "newly discovered evidence" or fraud is not permitted. *See, e.g., Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1088-89 (9th Cir. 2001) (circumstances described in purported motion under Rule 60(b)(6) in fact fell within either newly discovered evidence of fraud provisions, and so could not be urged under subdivision (6)); *Brandon v. Chicago Bd. of Educ.*, 143 F.3d 293, 294-96 (7th Cir. 1998) (untimely motion under Rule 60(b)(1) may not be considered under Rule 60(b)(6)); *Simon v. Navon*, 116 F.3d 1, 5-6 (1st Cir. 1997) (untimely motion under Rule 60(b)(3) may not be construed as motion under Rule 60(b)(6)).

Moreover, relief under Fed. R. Civ. P. 60(b)(6) requires the demonstration of extraordinary circumstances. *See, e.g., Jinks v. AlliedSignal, Inc.*, 250 F.3d 381, 385-86 (6th Cir. 2001) (alleged illness of putative affiant was not exceptional circumstance warranting relief from summary judgment when affidavit could have been obtained prior to illness).

Further, misapplication of the law by the court is a matter to be addressed by appeal, so that an error of law by the District Court does not constitute extraordinary circumstances justifying relief under Fed. R. Civ. P. 60(b)(6). *See Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 628-629 (7th Cir. 1997) (incorrect interpretation of law by federal court did not justify relief from federal judgment under Fed. R. Civ. P. 60(b)).

Likewise, a change in the governing law is not an extraordinary circumstance justifying relief from judgment under Rule 60(b). *See Kansas Pub. Employees Retirement Sys. V. Reimer & Koger Assocs.*, 194 F.3d 922, 925-26 (9th Cir. 1999).

Third, the "savings clause" of Fed. R. Civ. P. 60(b) provides for the possibility of an "independent action" and the basis of "fraud on the court" for setting aside a judgment, as

follows:

> This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court.

Fed. R. Civ. P. 60(b) (emphasis added).

The Supreme Court has expressly held that "independent action" simply means that the litigant would have to prove that fraud upon the court had occurred in the independent action, as opposed to filing a motion pursuant to Fed. R. Civ. P. 60(b); and relief in such action should rarely be granted, and is available only when not inconsistent with the strictures of Rule 60(b) and when necessary "to prevent a grave miscarriage of justice." See *United States v. Beggerly*, 524 U.S. 38, 118 (1998).

The Third Circuit, however, has adopted a very demanding test for the "fraud on the court". *See Herring v. United States*, 424 F.3d 384 (3d Cir. 2005).

B. THIRD CIRCUIT PRECEDENT: *Herring v. United States*.

In *Herring v. United States*, 424 F.3d 384 (3d Cir. 2005), the Third Circuit considered the doctrine of fraud upon the court in the context of an independent action. The plaintiffs were widows of civilian engineers who died in an October 1948 crash of a B-29 bomber in Waycross, Ga. *See id.* The plaintiffs argued that military officials committed fraud on the court in the original 1949 lawsuit when they allegedly "lied" to the trial and appellate courts to prevent the disclosure of an Air Force report on the crash to the court. *See id.* The plaintiffs alleged that the military officials falsely claimed that the Air Force report contained "military secrets" and was therefore privileged, which resulted in the District Court awarding judgment to the plaintiffs but for a limited amount--since the case was unable to proceed in light of the government's military secrets claim. *See id.* The allegedly false statements were made in the affidavit of a military

attorney, i.e., a Judge Advocate, and the Secretary of the Air Force, both made under oath. *See id.* The case asserting fraud on the court was filed after the daughter of one of the deceased engineers discovered early in 2000, through an internet search, that the Air Force Report had been de-classified, and in her opinion contained no military secrets. *See id.*

The decision in *Herring v. United States* announces an extremely difficult test for proving a "fraud upon the court." The Third Circuit began by noting that actions for fraud upon the court are extremely rare because it challenges "the very principle upon which our judicial system is based: the finality of a judgment", as follows:

> Actions for fraud upon the court are so rare that this Court has not previously had the occasion to articulate a legal definition of the concept. The concept of fraud upon the court challenges the very principle upon which our judicial system is based: the finality of a judgment. The presumption against the reopening of a case that has gone through the appellate process all the way to the United States Supreme Court and reached final judgment must be not just a high hurdle to climb but a steep cliff-face to scale.

See id. (emphasis added).

The Third Circuit reviewed the jurisprudence of fraud on the court by reviewing the decisions of other United States Courts of Appeals, and found that the doctrine of fraud upon the court constitutes only the most egregious misconduct which attacks the machinery of the court, itself, as follows:

> Although other United States Courts of Appeals have not articulated express elements of fraud upon the court as the Sixth Circuit did, the doctrine has been characterized "as a scheme to interfere with the judicial machinery performing the task of impartial adjudication, as by preventing the opposing party from fairly presenting his case or defense." *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 538 F.2d 180, 195 (8th Cir. 1976) (citations omitted); *see also Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978) (holding "only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court"). Additionally, fraud upon the court differs from fraud on an adverse party in that it "is limited to fraud which seriously affects the integrity of the normal process of adjudication." *Gleason v. Jandrucko*,

860 F.2d 556, 559 (2d Cir. 1998).

See id. (emphasis added).

Consequently, the Third Circuit held that fraud upon the court, in the Third Circuit, constitutes "a demanding standard", which it articulated as follows:

> [W]e will employ a demanding standard for independent actions alleging fraud upon the court requiring: (1) an intentional fraud; (2) by an officer of the court; (3) which is directed at the court itself; and (4) that in fact deceives the court. We agree with the Court of Appeals of the Eighth Circuit that the fraud on the court must constitute "egregious misconduct . . . such as bribery of a judge or jury or fabrication of evidence by counsel." *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 538 F.2d at 195 (citations omitted).

See id. (emphasis added).

In addition, the Third Circuit imposed the following requirements:

> We further conclude that a determination of fraud on the court may be justified only by "the most egregious misconduct directed to the court itself," and that it "must be supported by clear, unequivocal and convincing evidence." *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 538 F.2d 180, 195 (8th Cir. 1976) (citations omitted).

See id. (emphasis added).

In reaching its holding, the Third Circuit reiterated that in order for the fraud to involve "egregious misconduct directed to the court itself", it must involve an officer of the court, so that perjury by a witness alone is insufficient, as follows:

> [W]e agree with the courts analyzing fraud upon the court which have required the fraud to be perpetrated by an "officer of the court." *See Geo. P. Reintjes, 71 F.3d at 49; Demjanjuk, 10 F.3d at 348; Lockwood v. Bowles,* 46 F.R.D. 625, 632 (D.C. Cir. 1969). These cases have noted, and we agree, that perjury by a witness is not enough to constitute fraud upon the court. *See e.g., Geo. P. Reintjes Co.*, 71 F.3d at 49 ("The possibility of perjury, even concerted, is a common hazard of the adversary process with which litigants are equipped to deal through discovery and cross-examination, and, where warranted, motion for relief from judgment to the presiding court. Were mere perjury sufficient to override the considerable value of finality after the statutory time period for motions on account of fraud has expired, it would upend [Rule 60's] careful balance.") (citations omitted).

See id. (emphasis added).

To summarize, in the Third Circuit, fraud on the court has the following elements, as set forth in *Herring v. United States*:

(1) an intentional fraud;
(2) by an officer of the court;
(3) which is directed at the court itself;
(4) that in fact deceives the court;
(5) a determination of fraud on the court may be justified only by "the most egregious misconduct directed to the court itself (such as bribery of a judge or jury or fabrication of evidence by counsel); and
(6) the fraud "must be supported by clear, unequivocal and convincing evidence."

See id.

In applying the standard for fraud on the court to the *Herring* facts, the Third Circuit held that the fraud on the court standard was not met, as follows:

> Because there is an obviously reasonable truthful interpretation of the statements made by the Air Force, Appellants are unable to make out a claim for the perjury which, as explained above, forms the basis for their fraud upon the court claim. We, therefore, conclude that Appellants failed to state a claim upon which relief can be granted.

See id.

II. SUMMARY OF CONTENTIONS IN SUPPORT OF RE-OPENING THE CASE

Mr. Okin has summarized the five areas he contends constitute fraud on the court, in his email to Mr. Inga of February 15, 2006, as follows:

> These are the five areas in which we feel ATT committed fraud upon the court and 800 Services.
>
> 1) The whole issue of restructuring, being denied by ATT, being told I was not allowed to, Having Shipp deposed and playing dumb, the fact Shipp was compensated by ATT and this not being disclosed to the court. The fact that if the court was not misled intentionally by ATT, Politan would have ruled in 800 Services favor.
>
> 2) Non transfer of 800 Services plan, Shipp flat out lies in the deposition, and ATT using this lie upon the court, If Judge Politan knew that Shipp had indeed

been given a proper transfer of my plan, Politan would have sent this case up to the FCC for further review.

3) The FCC recently ruled that ATT acted in an illegal way pertaining to applying shortfall charges, this was an act of fraud, also ATT committed mail fraud by utilizing the U.S. Postal service.

4) The fact that interrogatories questions requesting information not once but infact twice were ignored. I have recently discovered from Al Inga numerous letters from Larry Shipp to ATT, these letters show he played dumb during his deposition, ATT failed to provide documentation that Shipp was compensated.

5) Discrimination, there are two areas here to look at, one is section 202, and the other is section 203.

A copy of the email thread containing this email is annexed hereto as Exhibit "11" (emphasis added).

Mr. Inga summarizes his contentions, which overlap with Mr. Okin's contentions, in his statement. *See* Inga Statement, pp. 49-51 (Exhibit "10").

In addition, Mr. Inga summarized the significance of the testimony of Mr. Larry Shipp, as follows:

The lies that Shipp stated are not direct lies. They are lies of omission at best. The main thing you need is two things 1) The plan was properly restructured and AT&T did not give 800 Services credit for this. AT&T lied and said he would have penalties assessed against him. 2) The accounts were transferred to Shipp and he did confirm AT&T denied the transaction. THAT IS IT PERIOD.

Shipps statements in the deposition were misconstrued by AT&T. There is not a direct lie regarding these two items.
To say Shipp was compensated $100 million is far fetched. He was given cash less than a million. AT&T told him that he did not have to pay shortfall and termination which were bogus charges anyway that required no rendering of services by AT&T.

The Court would believe AT&T misrepresented and misconstrued Shipp more than Shipp willing to commit perjury to assist AT&T. The point is AT&T is the one who defrauded Phil.

When Shipp now finds out about how AT&T lied he sets the record straight and says AT&T defrauded 800 Services. His letters back up his statements.

See Email from Mr. Inga, dated January 31, 2006, which is annexed hereto as Exhibit "12" (emphasis added).

III. APPLICATION OF APPLICABLE LAW TO THE CONTENTIONS IN SUPPORT OF REOPENING THE CASE.

A. AT&T'S DENIAL OF RESTRUCTURING AS FRAUD ON THE COURT CONTENTION.

1. Background of the Restructuring Contention

With respect to restructuring, relating to Counts Seven and Eight, the District Court recognized: "800 Services also contends that AT&T tortiously interfered with its business when AT&T refused to allow 800 Services to restructure its plan." *800 Services, Inc. v. AT&T Corp.*, No. 98-1539 (D.N.J. Aug. 28, 2000), *aff'd*, 2002 WL 215625 (3d Cir. Feb. 12, 2002) (Exhibit "3", p. 20). The District Court found the following facts relating to the restructuring contention:

> In or about July 21, 1995, 800 Services then attempted to "restructure" its CSTP II Plan. By letter dated July 25, 1995, AT&T responded to 800 Services's request to restructure its CSTP II Plan and outlined the terms and conditions specified under Tariff No. 2 that were applicable to this request. *See* Solomon Cert., Exhibit I. Specifically, AT&T advised 800 Services that under the tariff, if 800 Services restructured its existing CSTP II Plan, 800 Services would remain liable under the tariff for any shortfall charges accrued in the first year of its plan and, in the event that 800 Services failed to satisfy its Minimum Annual Commitment for the first year of the existing plan, it would also be required to repay the promotional credits paid to 800 Services under the plan. *See* id. AT&T advised 800 Services to notify it if 800 Services wished to proceed with this request. *See id.* 800 Services never attempted to proceed with this request. *See* Okin Dep. at page 94, lines 7-10. In fact, Okin testified that 800 Services did not qualify for a restructuring of its plan under the terms of the governing tariff. *See* Okin Dep. at page 134, lines 7-11.

See id. (Exhibit "3", pp. 10-11) (emphasis added).

It should also be noted that the District Court found that "the allegations of the Complaint concern service to which 800 Services subscribed after August 1, 1994." *See 800 Services, Inc.*

v. AT&T Corp., No. 98-1539 (D.N.J. Aug. 28, 2000), *aff'd*, 2002 WL 215625 (3d Cir. Feb. 12, 2002) (emphasis added) (Exhibit "3", p. 8).

With respect to restructuring, the District Court held:

> Further, 800 Services's [sic] allegation that AT&T wrongfully refused its request to restructure is belied by the testimony if [sic] its President. The record reveals that AT&T responded to 800 Services's request to restructure its CSTP II Plan and outlined the terms and conditions specified under Tariff No. 2 that were applicable to this request. *See* Solomon Cert., Exhibit I. Specifically, AT&T advised 800 Services that under the tariff, if 800 Services restructured its existing CSTP II Plan, 800 Services would remain liable under the tariff for any shortfall charges accrued in the first year of its plan and, in the event that 800 Services failed to satisfy its Minimum Annual Commitment for the first year of the existing plan, it would also be required to repay the promotional credits paid to 800 Services under the plan. *See id.* AT&T advised 800 Services to notify it if 800 Services wished to proceed with this request. *See id.* 800 Services never attempted to proceed with this request. *See* Okin Dep. at page 94, lines 7-10. In fact, Okin testified that 800 Services did not qualify for a restructuring of its plan under the terms of the governing tariff. *See* Okin Dep. at page 134, lines 7-11.

See id. (Exhibit "3", p. 21-22) (emphasis added).

On appeal to the Third Circuit, 800 Services described the attempted restructuring as follows:

> AT&T's Refusal to Restructure or Merge 800 Services
>
> 800 Services tried to restructure its existing plan but AT&T would not allow this. 800 Services tried to merge its plan to Contract Tariff 516, which would have been a bigger savings for the end users and a higher commission for 800 Services. The merger was to go through GE because GE had the tariff. The paperwork was sent and 800 Services was told that it met all the guidelines. But AT&T denied the merger. [*A502*] The merger was attempted through Combined Companies, Inc., owned by Larry Shipp. [*A549; A698 to A699*] The merger was denied by AT&T on July 25, 1995. *[A575 to A576]*
>
> Mr. Inga testified that AT&T would not provision onto Contract Tariff 516 either his or 800 Services' customers. AT&T would not allow the transfer of accounts from one plan to the other. *[A325 to A328]* Mr. Inga testified that two companies were given Contract Tariff 516. *[A375 to A376]*

Appellate Brief of 800 Services, p. 12 (a copy is attached hereto as Exhibit "13") (emphasis

added).

The Third Circuit affirmed the District Court's award of summary judgment as to Counts Seven and Eight by noting that "the District Court found a lack of evidence in support of 800 Services' tortious interference claims", and noted that "Although 800 Services presumptively argues on appeal that the business would have continued to flourish but for AT&T's actions, it offers no details to support that contention." *800 Services, Inc. v. AT&T Corp.*, 2002 WL 215625 (3d Cir. Feb. 12, 2002) (Exhibit "4", p. 2). Further, in affirming the grant of summary judgment for AT&T on the counterclaim, the Third Circuit expressly found:

> The agreement between the parties was controlled by the Tariff No. 2. Tariff No. 2 requires that the aggregator pay the provider for usage and shortfall charges. 800 Services has not contested incurring usage charges or the amounts thereof.

See id. (Exhibit "4").

2. <u>Nature of Okin and Inga's Restructuring Contention</u>

Mr. Okin summarized his contention regarding restructuring in an email, dated February 15, 2006, as follows:

> 1) The whole issue of <u>restructuring</u>, being denied by ATT, being told I was not allowed to, Having Shipp deposed and playing dumb, the fact Shipp was compensated by ATT and this not being disclosed to the court. The fact that if the court was not misled intentionally by ATT, Politan would have ruled in 800 Services favor.

See Email from Mr. Okin, dated February 15, 2006 (Exhibit "11") (emphasis added).

Mr. Inga's contention that AT&T's refusal to permit 800 Services to restructure violated the Communications Act is discussed *infra*. Apart from said purported Communications Act violations, the gist of the contention regarding restructuring is that any of 800 Services plans which were pre-June 17, 1994, CSTP2, would be grandfathered under a pre-existing tariff, which only had to meet fiscal year end shortfall commitments, and not the more arduous monthly pro-

rata commitments. *See* Inga Statement, pp. 5-14 (Exhibit "10"). Hence, Mr. Inga contends that AT&T acted improperly in advising 800 Services that it would remain liable under the tariff for any shortfall charges, which allegedly convinced Mr. Inga not to demand that AT&T accept the purported restructuring. *See id.*

More important, Mr. Inga contends that AT&T's attorneys acted fraudulently in the litigation, discussed herein, by *inter alia* (a) entering into a settlement with Mr. Shipp in separate litigation with him, which required him to cooperate with AT&T, and then subpoening him in a deposition, purportedly without disclosing the existence of said settlement; (b) by arguing that 800 Services was subject to shortfall charges, after Judge Politan had allegedly ruled on the issue differently in *Combined Companies, Inc. v. AT&T Corp.*, No. 95-908 (D.N.J. Feb. 24, 1995); and (c) by not producing certain letters from Mr. Shipp which allegedly show that no shortfall and termination charges can ever be imposed on pre-June 17,1994 plans if timely restructured. *See* Inga Statement (Exhibit "10").

With respect to Mr. Shipp's testimony at the deposition, Mr. Inga does not claim that Mr. Shipp made any express misrepresentations. Instead, Mr. Inga argues that Mr. Shipp committed "lies of omission." Mr. Inga summarized his arguments regarding Mr. Shipp's testimony, in an email dated January 31, 2006, as follows:

> The lies that Shipp stated are not direct lies. They are lies of omission at best. The main thing you need is two things 1) The plan was properly restructured and AT&T did not give 800 Services credit for this. AT&T lied and said he would have penalties assessed against him. 2) The accounts were transferred to Shipp and he did confirm AT&T denied the transaction. THAT IS IT PERIOD.
>
> Shipps statements in the deposition were misconstrued by AT&T. There is not a direct lie regarding these two items.

See Email from Mr. Inga, dated January 31, 2006, which is annexed hereto as Exhibit "12" (emphasis added).

Mr. Inga contends, *inter alia*, that the District Court erred in the subject case by holding that 800 Services was subject to shortfall and termination penalties because 800 Services' plans were actually purportedly ordered before June 17, 1994, and were therefore "grandfathered" on a previous tariff, as follows:

> What happened in the 800 Services, Inc. case before Judge Politan is that Judge Politan never had to understand which paper work gets filled out by an aggregator and what boxes are selected etc. This is because the Inga Companies plans traffic only was attempted to be transferred in Jan of 1995 and the plans had not been restructured between June 17th 1994 and Jan of 1995. Therefore the Court never needed to understand how an aggregator through the paper work maintains its grandfathered status.

Inga Statement, p. 41 (Exhibit "10") (emphasis added).

3. Application of the law to Okin and Inga's Restructuring Contention

To begin with, it is important to reiterate that the District Court disposed of 800 Services' restructuring arguments by finding that:

> AT&T advised 800 Services to notify it if 800 Services wished to proceed with this request. *See id.* 800 Services never attempted to proceed with this request. *See* Okin Dep. at page 94, lines 7-10." Moreover, the District Court noted: "In fact, Okin testified that 800 Services did not qualify for a restructuring of its plan under the terms of the governing tariff. *See* Okin Dep. at page 134, lines 7-11."

See 800 Services, Inc. v. AT&T Corp., No. 98-1539 (D.N.J. Aug. 28, 2000), *aff'd*, 2002 WL 215625 (3d Cir. Feb. 12, 2002) (Exhibit "3", pp. 21-22). Now, if Mr. Okin was misguided in his pre-litigation belief regarding whether he legally qualified for a restructuring: this is something which had to be presented to the District Court; however, at this point, none of the contentions made by Mr. Inga and Mr. Okin provide any reasonable basis for contending that the District Court's holding would have been different since the District Court's holding on the restructuring was based on Mr. Okin's own testimony. *See id* (Exhibit "3", pp. 21-22); *see also* Inga Statement, (Exhibit "10"). Consequently, these contentions regarding restructuring do not

provide a basis for reopening the subject case pursuant to Fed. R. Civ. P. 60(b). *See, e.g., MCI Telecommunications Corp., v. Matrix Communications Corp.*, 135 F.3d 27, 35-37 (1st Cir. 1998) (relief from judgment was properly denied when newly discovered evidence was not likely to have changed outcome of action).

Nonetheless, even if these contentions regarding restructuring could somehow result in a different outcome, they do not provide a basis for reopening the case under Fed. R. Civ. P. 60(b). First, to the extent that these contentions constitute a misapplication of law as Mr. Inga claims ("What happened in the 800 Services, Inc. case before Judge Politan is that Judge Politan never had to understand which paper work gets filled out by an aggregator and what boxes are selected etc."): misapplication of the law by the court is a matter to be addressed by appeal, so that an error of law by the District Court does not constitute extraordinary circumstances justifying relief under Fed. R. Civ. P. 60. *See Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 628-29 (7th Cir. 1997) (incorrect interpretation of law by federal court did not justify relief from federal judgment under Fed. R. Civ. P. 60(b)).

Second, to the extent that these contentions regarding restructuring could be based on "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)", or are based on "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party": these contention are barred by the one year time limit of Fed. R. Civ. P. 60(b) which expressly mandates that any such motions be made "not more than one year after the judgment, order, or proceeding was entered or taken"--since the final judgment was entered on or about September 18, 2000. *See* docket (doc. no. 53) (Exhibit "2", p. 6).

Further, in applying the Third Circuit's *Herring* test, regarding fraud on the court, to the

contentions made by Mr. Okin and Mr. Inga relating to restructuring, shows that these contentions fail the *Herring* test. Each element of the *Herring* test will be addressed separately, as follows.

a. An intentional fraud.

As a preliminary matter, it is important to note that whether AT&T acted improperly in advising Mr. Okin prior to the litigation about the applicability of the shortfall charges was one of the subjects of the closed litigation, and--by itself--is not the type of fraud (even assuming that it could be considered fraud) which can be considered under the *Herring* test, which concerns fraud upon the court, itself, in the litigation. Hence, Mr. Okin's contention regarding restructuring of "being denied by ATT, being told I was not allowed to" is inapposite to the *Herring* test, i.e., it is not the type of wrong which the doctrine of fraud on the court is intended to remedy.

The only misrepresentations in the litigation which Mr. Okin and Mr. Inga attempt to point to in their contentions, regarding restructuring, concern Mr. Shipp's testimony. A copy of the transcript of Mr. Shipp's testimony is annexed hereto as Exhibit "14".

With respect to Mr. Shipp's testimony, Mr. Inga has characterized the nature of his misrepresentations as "lies of omission". For example, Mr. Okin characterizes Mr. Shipp's testimony as: "Having Shipp deposed and playing dumb". As noted *supra*, Mr. Inga stated:

> The lies that Shipp stated are not direct lies. They are lies of omission at best....
>
> Shipps statements in the deposition were misconstrued by AT&T. There is not a direct lie regarding these two items.

See Email from Mr. Inga, dated January 31, 2006, which is annexed hereto as Exhibit "12" (emphasis added).

There is no question that this contention regarding Mr. Shipp's testimony is not the type

of "fraud" that is recognized under the *Herring* test. First, to the extent that Mr. Shipp omitted volunteering anything is not a misrepresentation, or a "lie of omission", because a deposed witness is only required to answer the questions which are expressly put to him, i.e., he is not under any duty to volunteer information. Moreover, Fed. R. Civ. P. 26(e) which requires parties to supplement a response "if the party learns that the response is in some material respect incomplete or incorrect...." is not applicable to depositions. *See, e.g., Griswold v. Fresenius USA, Inc.*, 978 F. Supp. 718, 722 (N.D. Ohio 1997).

Second, even if Mr. Shipp could have been considered to have been under a duty to volunteer information, the nature of the "omissions" which Mr. Shipp allegedly omitted are not the type of misrepresentations of fact which would establish a fraud under the *Herring* test. Specifically, Mr. Okin and Mr. Inga apparently believe that Mr. Shipp was required to offer his opinion regarding the operations of the tariffs in question, i.e., that 800 Services plans which were pre-June 17, 1994, CSTP2, would be grandfathered under a pre-existing tariff, which only had to meet fiscal year end shortfall commitments, and not the more arduous monthly pro-rata commitments. *See* Inga Statement, (Exhibit "10").

However, as a witness, Mr. Shipp was only competent to testify to facts which he had knowledge of. Mr. Shipp would not be required to act as an expert witness for 800 Services. *See generally*, Fed. R. Evid. 701 (excluding opinions by lay witness which are "based on scientific, technical, or other specialized knowledge within the scope of Rule 702.") (emphasis added). Consequently, if 800 Services wished to explain to the court its legal interpretation of the applicability of shortfall charges under the applicable tariffs, it was required to do so either through its attorneys, or through an expert witness. It could not expect Mr. Shipp to volunteer his opinion, especially when he was not directly asked his opinion by 800 Services' attorney.

Third, a review of Mr. Shipp's deposition shows that he actually referred to "a commonly held opinion" regarding shortfall charges, as follows:

> Q. Did he [Mr. Okin] ever discuss a means or mechanism to avoid paying the shortfall charges in the event that they were assessed against his plans?
>
> A. No. I do not. But there was a commonly held opinion that in certain instances the tariff that governed these plans precluded any termination penalty.

Shipp. Depo. p. 45 (Exhibit "14")(emphasis added).

Fourth, the contention that a fraud was perpetrated on the court in the form of a "lie of omission"--with respect to the grandfathering of 800 Services pre-June 17, 1994, CSTP2 plans--is belied by Mr. Inga's own testimony in this litigation. Specifically, Mr. Inga expressly explained in his deposition in the subject litigation that the "old CSTP2 plan, cannot go into shortfall, as long as it was restructured on a timely basis", as follows:

> 13 Q. Did you and Mr. Okin discuss the fact
> 14 that at least some of his plans were post June
> 15 17th, 1994?
>
> 16 A. I don't know as far as what plans were,
> 17 what plans weren't, and I just told him basically
> 18 what the -- what the FCC tariff indicated and what
> 19 Mr. Fitzpatrick, who was the account manager, had
> 20 explained as to what the rules and regulations are
> 21 regarding when traffic can be transferred; and the
> 22 old plan, the old CSTP2 plan, cannot go into
> 23 shortfall, as long as it was restructured on a
> 24 timely basis, and Mr. Okin would have to manage his
> 25 own plans.

Inga. Depo. p. 18 (lines 13-25) to p. 19 (line 1 to 6) (Exhibit "15") (emphasis added).

In fact, Mr. Okin testified regarding his contentions relating to the grandfathering of the pre-June 17, 1994, CSTP2 plans, and also reiterated that an audiotape is in the record of this litigation "which completely describes what a new plan is versus an old plan, et cetera", as follows:

A. I believe Mr. Okin was attempting to transfer the traffic on any of the plans that were pre June 17th, 1994, CSTP2, which would grandfather him. Those plans cannot be subjected to shortfall charges because they are pre June 17th, 1994, issued RVPP ID numbers.

I think you have the audiotape which completely describes what a new plan is versus an old plan, et cetera.

See id., at p. 17 (lines 9-17) (Exhibit "15").

Fifth, the District Court in the subject case did not accept Mr. Okin's contention that he did not have to pay the shortfall charges, as Mr. Okin testified in his deposition, and despite Mr. Inga's testimony in his deposition that the "old CSTP2 plan, cannot go into shortfall, as long as it was restructured on a timely basis". Note that the District Court found:

> The record reveals that Okin then embarked upon a series of "strategies" seemingly aimed at avoiding the shortfall charges which, incidentally, Okin believed he did not have to pay. *See Okin Dep.* at page 166, lines 3-10.

800 Services, Inc. v. AT&T Corp., No. 98-1539 (D.N.J. Aug. 28, 2000), *aff'd*, 2002 WL 215625 (3d Cir. Feb. 12, 2002) (Exhibit "3", p. 9) (emphasis added). Nonetheless, the District Court held:

> Tariff No. 2 further provides that the customer will incur "shortfall" charges in the event that it does not satisfy its Minimum Revenue Commitment and "termination" charges if it discontinues service before the completion of the term. See Id.

Id. (Exhibit "3", p. 7) (emphasis added). The Third Circuit, which could have reviewed the record in the subject case, including Mr. Inga's deposition testimony, affirmed the District Court, holding:

> The agreement between the parties was controlled by the Tariff No. 2. Tariff No. 2 requires that the aggregator pay the provider for usage and shortfall charges. 800 Services has not contested incurring usage charges or the amounts thereof.

800 Services, Inc. v. AT&T Corp., 2002 WL 215625 (3d Cir. Feb. 12, 2002) (Exhibit "4", p. 2) (emphasis added).

Hence, the notion that Mr. Shipp could some how have committed the egregious fraud of fraud on the court, within the meaning of *Herring*, by omitting to stress the legal argument made by Mr. Inga in his deposition that "old CSTP2 plan, cannot go into shortfall, as long as it was restructured on a timely basis" borders on the nonsensical.

Sixth, the fact that AT&T continues to litigate in court--to this day--that "the tariff still allows AT&T to inflict shortfall against properly restructured plans" --i.e., the position accepted by the District Court and Third Circuit in the subject case--shows that this is simply a legal issue which continues to be litigated. As Mr. Inga states:

> It must also be noted that AT&T is still arguing today in the Inga Companies remaining case against AT&T that the tariff still allows AT&T to inflict shortfall against properly restructured plans even though the tariff clearly favors the aggregator. AT&T has never admitted what the tariff seems to make clear.

See Inga Statement (Exhibit "10", p. 22).

In fact, AT&T argues in its brief opposing the Inga Companies' pending motion to vacate, in *Combined Companies, Inc. v. AT&T Corp.*, No. 95-908 (D.N.J. Feb. 24, 1995), as follows:

> The claim that shortfall charges are not a genuine obligation ignores the tariff's language, statutory and regulatory requirements, and court decisions, including one by Judge Politan in 2000, awarding AT&T shortfall charges incurred under its tariffs. *See Telecom Int'l America, Ltd. v. AT&T Corp.*, 67 F. Supp.2d 189, 221 (S.D.N.Y. 1999) (granting summary judgment for shortfall charges); *800 Services, Inc. v. AT&T Corp.*, Civil Action No. 9801539, (D.N.J. Aug. 28, 2000) (awarding approximately $1.3 million in shortfall charges) (Politan, J.), *aff'd*, 2002 WL 2155625 (3d Cir. Feb. 12 2002).

Brief of AT&T in opposition to the Inga Companies' motion to vacate stay, (doc. no. 126)(Exhibit "8", p. 15) (emphasis added).

Moreover, regarding Mr. Inga's "grandfathering" arguments, AT&T argues in the same brief:

> There is also no merit to Plaintiffs' claim that the nine plans were "immune" from shortfall or termination charges because they were supposedly ordered before June 17, 1994. Judge Politan made no such finding; at most, the Court noted that in the context of termination charges, there were methods for defraying or erasing liability by transferring commitments to a new plan. (May 19, 1995 Opinion at 11). That observation clearly does not constitute a finding that Plaintiffs' plans were immune from shortfall or termination. Moreover, as the FCC noted, whether these plans were pre-or post-June 17, 1994 plans is disputed. (*See* FCC Opinion at ¶19 n. 93).

See id. (Exhibit "8", p. 15, n. 4).

Seventh, with respect to the contention that AT&T should have disclosed that it had settled with Mr. Shipp: it is true that an argument can be made that AT&T should have disclosed this fact as a matter of candor; however, it must also be pointed out that 800 Services' attorney at the deposition agreed that Mr. Shipp would not be required to answer any questions regarding any case other than the subject litigation. Specifically, AT&T's attorney asked Mr. Shipp, the following:

> Q. You are appearing pursuant to a subpoena we issued in the case captioned 800 Services v. AT&T, and we've scheduled the deposition for today. You indicated to me in a fax – both in a fax and orally on the phone yesterday, that you were agreeing to appear for this deposition, but you are willing to answer only questions relating to this case and no other case, and that's – as I understand it, that's a concern because Mr. Murray represents other clients in a case which you are involved; is that correct?
>
> A. That's correct.

Shipp. Depo. pp. 3-4 (Exhibit "14") (emphasis added).

The attorney for 800 Services, Mr. John H. Murray, Jr., then expressly agreed that Mr. Shipp would only be asked questions about this case, as follows:

> Q. So it's my intention to ask only about this case, only questions relevant to the claims asserted 800 Services against AT&T, and any counterclaims that are

in this matter.

> And while we were waiting to set up, I advised Mr. Murray that you had sent a fax, I don't think that he received it, but he indicated to me he was also going to be agreeable to ask questions only about this matter.
>
> MR. BROWN: Is that correct, Mr. Murray?
>
> MR. MURRAY: That's correct.

See id. (emphasis added).

Finally, it should be noted that even if Mr. Shipp could somehow be deemed to have committed perjury by feigning a lack of memory, something which is very difficult to prove: the Third Circuit has expressly held that without a showing that the other requirements of fraud on the court are satisfied, including the egregious nature of the fraud: "perjury by a witness is not enough to constitute fraud upon the court." *See Herring v. United States*, 424 F.3d 384 (3d Cir. 2005) (quoting *Geo. P. Reintjes Co.*, 71 F.3d 44, 46-49 (1st Cir. 1995)).

In sum, the contention that Mr. Shipp engaged in "lies of omission" relating to the restructuring contention do not set forth a cognizable fraud, under the *Herring* test.

b. by an officer of the court;

Apart from there not being a cognizable fraud, since Mr. Shipp is not an officer of the court, the "by an officer of the court" element of *Herring* is not met by any actual showing of evidence implicating AT&T's counsel; mere conjecture does not suffice for such serious charges. *See* Inga Statement (Exhibit "10"). Moreover, any legal arguments presented by AT&T's attorneys would not normally by considered to be misrepresentations of fact.

c. which is directed at the court itself;

Since Mr. Shipp's testimony does not appear to contain an actual fraud, this element is not applicable.

d. that in fact deceives the court;

Since Mr. Shipp's testimony does not appear to contain an actual fraud, this element is

also not applicable. However, it is nonetheless important to note, as discussed *supra*, that the District Court disposed of 800 Services' restructuring arguments based on Mr. Okin's own testimony. *See 800 Services, Inc. v. AT&T Corp.*, No. 98-1539 (D.N.J. Aug. 28, 2000), *aff'd*, 2002 WL 215625 (3d Cir. Feb. 12, 2002) (Exhibit "3", pp. 21-22). Hence, even if Mr. Shipp's testimony were fraudulent, it is questionable whether it could be deemed to have deceived the District Court since the District Court based its grant of summary judgment on Mr. Okin's testimony. *See id.* Moreover, as noted *supra*, if Mr. Okin contends that AT&T deceived him regarding the shortfall charges, prior to the litigation, that was a subject for the litigation, itself: it would not be the type of fraud on the court which is cognizable under the *Herring* test.

e. a determination of fraud on the court may be justified only by "the most egregious misconduct directed to the court itself (such as bribery of a judge or jury or fabrication of evidence by counsel);

Since Mr. Shipp's testimony does not appear to contain an actual fraud, this element is also not applicable. But as with the other elements discussed above, it can be argued that even if Mr. Shipp's testimony did contain an express misrepresentation that it would not be deemed to be of the type considered "the most egregious misconduct directed to the court itself", within the meaning of *Herring*. *See Herring v. United States*, 424 F.3d 384 (3d Cir. 2005) (holding that "only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court") (quoting *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978) (emphasis added)).

f. the fraud "must be supported by clear, unequivocal and convincing evidence."

Since the contentions regarding restructuring do not establish a case for actual fraud, this element is not met.

B. NON-TRANSFER OF PLAN WITH ACCOUNTS AS FRAUD ON THE COURT CONTENTION

1. Background of the non-transfer of Plan Contention

With respect to the transfer of the plans, which also related to Counts Seven and Eight, the District Court granted summary judgment for AT&T, based on its finding that:

> 800 Services next contemplated moving certain business traffic from its Tariff No. 2 service to CT 516. Notwithstanding 800 Services's allegations in its Complaint, 800 Services has admitted in discovery that it did not qualify to subscribe directly to CT 516 and that 800 Services never actually submitted an order to AT&T for service to CT 516 or under any other contract tariff or to transfer service from Tariff No. 2 to CT 516. *See* Okin Dep. at pages 101-105.

800 Services, Inc. v. AT&T Corp., No. 98-1539 (D.N.J. Aug. 28, 2000), *aff'd*, 2002 WL 215625 (3d Cir. Feb. 12, 2002) (Exhibit "3", p. 11) (emphasis added). Note that the District Court's finding was based on Mr. Okin's own testimony.

On appeal, 800 Services stated, with respect to the transfer contention:

> AT&T's Refusal to Restructure or Merge 800 Services
>
> 800 Services tried to merge its plan to Contract Tariff 516, which would have been a bigger savings for the end users and a higher commission for 800 Services. The merger was to go through GE because GE had the tariff. The paperwork was sent and 800 Services was told that it met all the guidelines. But AT&T denied the merger. [*A502*] The merger was attempted through Combined Companies, Inc., owned by Larry Shipp. [*A549; A698 to A699*] The merger was denied by AT&T on July 25, 1995. *[A575 to A576]*
>
> Mr. Inga testified that AT&T would not provision onto Contract Tariff 516 either his or 800 Services' customers. AT&T would not allow the transfer of accounts from one plan to the other. *[A325 to A328]* Mr. Inga testified that two companies were given Contract Tariff 516. *[A375 to A376]*

Appellate Brief of 800 Services, p. 12 (a copy is attached hereto as Exhibit "13") (emphasis added).

The Third Circuit affirmed the District Court's grant of summary judgment. *800 Services, Inc. v. AT&T Corp.*, 2002 WL 215625 (3d Cir. Feb. 12, 2002) (Exhibit "4").

2. Nature of Okin and Inga's Transfer Contention

Other than the Communications Act contentions which are discussed *infra*, Mr. Inga summarized his contention regarding transfer, as follows:

> The lies that Shipp stated are not direct lies. They are lies of omission at best.... The accounts were transferred to Shipp and he did confirm AT&T denied the transaction. THAT IS IT PERIOD.
>
> Shipps statements in the deposition were misconstrued by AT&T. There is not a direct lie regarding these two items.

See Email from Mr. Inga, dated January 31, 2006, which is annexed hereto as Exhibit "12" (emphasis added).

Mr. Okin summarizes his contention regarding transfer, as follows:

> 2) Non transfer of 800 Services plan, Shipp flat out lies in the deposition, and ATT using this lie upon the court, If Judge Politan knew that Shipp had indeed been given a proper transfer of my plan, Politan would have sent this case up to the FCC for further review.

See email annexed hereto as Exhibit "11".

3. Application of the law to Okin and Inga's Transfer Contention

As with the restructuring contentions discussed *supra,* it must first be noted that the District Court disposed of the alleged wrongdoing relating to transfer based on Mr. Okin's own testimony, i.e., that "800 Services never actually submitted an order to AT&T for service to CT 516 or under any other contract tariff or to transfer service from Tariff No. 2 to CT 516." *800 Services, Inc. v. AT&T Corp.*, No. 98-1539 (D.N.J. Aug. 28, 2000), *aff'd*, 2002 WL 215625 (3d Cir. Feb. 12, 2002) (Exhibit "3", p. 11) (citing Okin Dep. at pages 101-105) (emphasis added). Consequently, the contentions regarding transfer, stated *supra*, (regarding Mr. Shipp's testimony) would not appear to result in a different outcome by the District Court since the District Court disposed of these allegations based on Mr. Okin's testimony. Therefore, they do

not appear to constitute a basis for relief pursuant to Fed. R. Civ. P. 60(b). *See, e.g., MCI Telecommunications Corp., v. Matrix Communications Corp.*, 135 F.3d 27, 35-37 (1st Cir. 1998) (relief from judgment was properly denied when newly discovered evidence was not likely to have changed outcome of action).

Also, as with the restructuring contentions discussed *supra*, even if these contentions regarding transfer could somehow result in a different outcome, they do not provide a basis for reopening the case under Fed. R. Civ. P. 60(b). First, to the extent that these contentions constitute a misapplication of law: misapplication of the law by the court is a matter to be addressed by appeal, so that an error of law by the District Court does not constitute extraordinary circumstances justifying relief under Fed. R. Civ. P. 60. *See Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 628-629 (7th Cir. 1997) (incorrect interpretation of law by federal court did not justify relief from federal judgment under Fed. R. Civ. P. 60(b)).

Second, to the extent that these contentions regarding transfer could be based on "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)", or are based on "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party": these contention are barred by the one year time limit of Fed. R. Civ. P. 60(b) which expressly mandates that any such motions be made "not more than one year after the judgment, order, or proceeding was entered or taken"--since the final judgment was entered on or about September 18, 2000. *See* docket (doc. no. 53) (Exhibit "2", p. 6).

Further, in applying the Third Circuit's *Herring* test, regarding fraud on the court, to the contentions made by Mr. Okin and Mr. Inga relating to transfer, shows that these contentions fail the *Herring* test. Each element of the *Herring* test will be addressed separately, as follows.

a. An intentional fraud.

To the extent that it is contended that Mr. Shipp engaged in a "lie of omission", the rule discussed supra regarding restructuring is equally applicable. Second, as with the restructuring contention, the contention that a fraud was perpetrated on the court in the form of a "lie of omission"--with respect to AT&T's purportedly improper actions relating to transfer--is belied by Mr. Inga's own testimony in this litigation. Specifically, Mr. Inga expressly testified:

> Q. Now, is it your understanding that Mr. Okin was attempting to transfer the plans themselves to GE or just the traffic on the plans?
>
> A. I believe Mr. Okin was attempting to transfer the traffic on any of the plans that were pre June 17th, 1994, CSTP2, which would grandfather him. Those plans cannot be subjected to shortfall charges because they are pre June 17th, 1994, issued RVPP ID numbers.
>
> I think you have the audiotape which completely describes what a new plan is versus an old plan, et cetera.

Inga depo., page 17 (lines 6 to 17) (emphasis added).

Hence, these arguments regarding transfer were disclosed to the District Court by Mr. Inga, himself.

In sum, the contention that Mr. Shipp engaged in "lies of omission" relating to the transfer contention does not set forth a cognizable fraud, under the *Herring* test.

b. by an officer of the court;

As with the restructuring contentions, apart from their not being a cognizable fraud, since Mr. Shipp is not an officer of the court, the "by an officer of the court" element of *Herring* is not met by the contentions set forth by Mr. Inga and Mr. Okin. Moreover, any legal arguments presented by AT&T's attorneys would not normally by considered to be misrepresentations of

fact.

c. which is directed at the court itself;

As with the restructuring contentions, since Mr. Shipp's testimony does not appear to contain an actual fraud, this element is not applicable.

d. that in fact deceives the court;

Since Mr. Shipp's testimony does not appear to contain an actual fraud, this element is also not applicable. However, as noted *supra*, it is nonetheless important to note that the District Court did not grant summary judgment to AT&T, relating to the transfer issue, based on Mr. Shipp's testimony. Instead, the District Court's findings were based on Mr. Okin's own testimony, as follows:

> 800 Services next contemplated moving certain business traffic from its Tariff No. 2 service to CT 516. Notwithstanding 800 Services's allegations in its Complaint, 800 Services has admitted in discovery that it did not qualify to subscribe directly to CT 516 and that 800 Services never actually submitted an order to AT&T for service to CT 516 or under any other contract tariff or to transfer service from Tariff No. 2 to CT 516. See Okin Dep. at pages 101-105.

800 Services, Inc. v. AT&T Corp., No. 98-1539 (D.N.J. Aug. 28, 2000), *aff'd*, 2002 WL 215625 (3d Cir. Feb. 12, 2002) (Exhibit "3", p. 11) (emphasis added). Consequently, it would appear that to the extent that any testimony actually "deceived" the court, it appears to be Mr. Okin's own testimony.

e. a determination of fraud on the court may be justified only by "the most egregious misconduct directed to the court itself (such as bribery of a judge or jury or fabrication of evidence by counsel);

Since Mr. Shipp's testimony does not appear to contain an actual fraud, this element is also not applicable. But as with the restructuring contentions, and the other elements discussed above, it can be argued that even if Mr. Shipp's testimony did contain an express misrepresentation that it would not be deemed to be of the type considered "the most egregious

misconduct directed to the court itself", within the meaning of *Herring*. *See Herring v. United States*, 424 F.3d 384 (3d Cir. 2005) (holding that "only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court") (quoting *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978) (emphasis added)).

f. the fraud "must be supported by clear, unequivocal and convincing evidence."

Since Mr. Shipp's testimony does not appear to contain an actual fraud, this element is also not applicable.

C. FCC ILLEGAL PENALTY CONTENTIONS

1. Background of the Illegal Penalty Contentions

Approximately three years after final judgment was entered in the subject case, the FCC issued a ruling in the *Combined Companies* case involving Mr. Inga's companies. Specifically, on or about October 17, 2003, the FCC ruled on a Joint Petition for Declaratory Ruling on the Assignment of Accounts (Traffic) Without the Associated CSTP II Plans Under AT&T Tariff F.C.C. No. 2 ("FCC decision"), in the case, *Combined Companies, Inc. v. AT&T Corp.*, No. 95-90G8 (D.N.J. Feb. 24, 1995). A copy of the docket in the *Combined Companies, Inc.*, is annexed hereto as Exhibit "5". A copy of the FCC decision is annexed hereto as Exhibit "6". A copy of the FCC decision is annexed hereto as Exhibit "6".

The following provides a summary of the background and procedural history to the *Combined Companies, Inc.* case (as stated by the D.C. Circuit):

> In the early 1990s, as other carriers began to acquire a share of the 800 market, the FCC began to loosen its regulation of AT&T. Starting in 1991, the Commission no longer forced the carrier to offer WATS only through the generic plans set forth in Tariff No. 2. Instead, the FCC gave AT&T the option of

individually negotiating "contract tariffs" with particular resale companies. As contract tariffs could be drawn to offer discounts greater than those available under Tariff No. 2, many resellers naturally sought to obtain them.

Alfonse Inga, a New Jersey businessman who owned several aggregator companies, was one such reseller. In 1994, Mr. Inga undertook a series of transactions designed to move his business from Tariff No. 2 to a more lucrative contract tariff. First, his companies — each of which operated under CSTP II, a type of plan offered under Tariff No. 2 — transferred all nine of their plans to a new entity, Combined Companies, Incorporated (CCI). As required by Section 2.1.8 of Tariff No. 2, CCI expressly agreed to assume all obligations of the transferor companies. The transfer also stipulated that CCI would pass 80 percent of its profits on to the transferor companies. Second, CCI attempted to negotiate a contract tariff with AT&T. Third, as temporary cover until this envisioned contract tariff became a reality, or as a permanent alternative in case it never did, Mr. Inga planned another transfer — one between CCI and Public Services Enterprises of Pennsylvania (PSE). PSE already had a contract tariff with AT&T at a substantially larger discount on AT&T's 800 service than that available to CCI under Tariff No. 2.

AT&T resisted this series of transactions. Fearing that CCI would not have the assets to meet its obligations under the transferred plans, AT&T initially refused to implement the first transfer (from the Inga companies to CCI) unless CCI paid a deposit — a requirement not found in Section 2.1.8 of Tariff No. 2. In 1995, the Inga companies and CCI brought suit against AT&T in federal district court in New Jersey, and the court ordered AT&T to drop the deposit requirement and implement the transfer. *Combined Companies, Inc. v. AT&T*, No. 95–908 (D.N.J. May 19, 1995) (unpublished opinion).

Meanwhile, CCI's negotiations for its own contract tariff failed and CCI entered into the second transfer, moving substantially all the 800 service in its CSTP II plans to PSE. As with the first transfer, the CCI-PSE agreement called for PSE to pass much of the realized profit back to CCI. The second transfer, however, differed from the first in an important respect. The parties attempted to structure the transaction to avoid Section 2.1.8 of Tariff No. 2, so that PSE would not have to assume CCI's obligations on the transferred service. To do this, the parties asked AT&T to move just the service to particular end-user businesses — the "traffic" under CCI's plans — and to leave the plans themselves otherwise intact. The parties hoped that, as a result, 800 service would be billed under PSE's substantially lower contract tariff rates, while CCI would remain responsible for the obligations to the carrier under Tariff No. 2.

AT&T balked at this second transfer as well. AT&T maintained that Section 2.1.8 applied to the transaction, and that PSE thus had to assume CCI's obligations in order for the transfer to go through. In addition, AT&T argued that the proposed transfer violated the tariff's "fraudulent use" provisions, as CCI

> almost certainly would fall short of its volume commitments once the traffic was moved to PSE's account, and AT&T had reason to believe that CCI would not have sufficient assets to pay the resulting penalties.
>
> The same district court that compelled AT&T to accept the first transfer declined to rule on the second, holding that tariff interpretation issues were within the primary jurisdiction of the FCC. *Id.* at *15. When none of the parties brought the primary jurisdiction matter to the agency, however, the district court went ahead and issued its own decision interpreting the tariff. *See Combined Companies, Inc. v. AT&T*, No. 95–908 (D.N.J. Mar. 5, 1996) (unpublished opinion). The Third Circuit vacated this ruling as inconsistent with the primary jurisdiction referral, and ordered the sides to bring the matter to the FCC's attention. *Combined Companies, Inc. v. AT&T*, No. 96–5185 (3d Cir. May 31, 1996) (unpublished opinion).

AT&T Corp. v. FCC, No. 03-1431 (D.C. Cir. January 14, 2005) (Exhibit "7", pp. 3-5).

The Third Circuit referred the following issue to the FCC: "whether section 2.1.8 of AT&T's Tariff FCC No. 2 permits an aggregator to transfer traffic under a tariffed plan without transferring the plan itself in the same transaction." FCC decision (Exhibit "6", pp. 1-2). The petitioners, the Inga Companies and Combined Companies Inc. ("CCI") had asserted in the District Court that aggregators had a right to transfer traffic under the tariffed plan without transferring the plan itself, while AT&T had contended that aggregators could not transfer traffic under a tariffed plan without transferring the plan itself. *See* FCC decision (Exhibit "6").

On October 17, 2003, the FCC ruled for the petitioners. The FCC held that Section 2.1.8 of AT&T Tariff FCC No. 2 did not apply to a transfer of "traffic", and therefore "because AT&T's tariff did not prohibit the movement of traffic without the plans, AT&T's refusal to move the traffic was unauthorized." *See* FCC decision (Exhibit "6", p. 12).

Second, the FCC ruled that AT&T had used an illegal remedy by availing itself of a remedy not "specified" in its tariff, and thereby violated subsection 203(c) of the Communications Act, as follows:

> Petitioners argue that, under the circumstances of this case, AT&T's refusal to

> move the end-user traffic from CCI to PSE violated section 203 of the Act. Subsection 203(c) forbids a carrier from employing or enforcing any classifications, regulations, or practices affecting its charges unless they are "specified" in the tariff and makes it unlawful for a carrier to deviate, in the rendition of tariffed services, from the charges, regulations, and practices set out in its filed tariff. We agree that, when AT&T availed itself of a remedy not "specified" under its tariff, it violated section 203 of the Act. As discussed in Section C above, pursuant to section 203, a carrier's tariff controls the rights and obligations of the carrier, which, as a matter of law, is required to abide by the tariffed terms and is precluded from acting outside it. AT&T's tariff did not prohibit the movement of traffic without plans. Thus, when AT&T availed itself of a remedy not "specified" in its tariff, that action violated subsection 203(c). Accordingly, we grant petitioner's request for declaratory ruling that AT&T violated section 203.

See FCC decision (Exhibit "6", pp. 13-14) (emphasis added).

In addition in reaching its ruling, the FCC addressed the issue of "whether the carriers' requests were permissible", and found that "AT&T's tariffs with these carriers did not prohibit the addition or subtraction of traffic" reasoning that "AT&T had neither proprietary interest in these individual end-user locations nor an expectation of revenue from them." *See* FCC decision (Exhibit "6", pp. 7-8, n. 52). The FCC explained its reasoning, in footnote 52, as follows:

> *See generally* AT&T Tariff FCC No. 2; AT&T Contract Tariff FCC No. 516. As AT&T concedes, the end-users or "locations," were CCI's customers, not AT&T's. *See* AT&T Further Comments at 6-10 (citing, *inter alia*, *AT&T Corp. v. Winback & Conserve Program, Inc.*, 16 FCC Rcd at 16075, para. 3; *First District Court Opinion* at 3); *see also MCI Telecommunications Corp v. AT&T*, File No. E-90-28, Order, 7 FCC Rcd 5096, 5100, para. 20 (CCB 1992). Because these end-users did not choose AT&T as their primary interexchange carrier, AT&T had neither proprietary interest in these individual end-user locations nor an expectation of revenue from them. *See Hi-Rim Communications, Incorporated v. MCI Telecommunications Corporation*, File No. E-96-14, Memorandum Opinion and Order, 13 FCC Rcd 6551, 6559 para. 13 (CCB 1998). Accordingly, AT&T could not refuse to move them out of CCI's CSTP II and into PSE CT 516. The fact that CCI sought to move all of its end-user locations, rather than just one or a few locations, did not confer a right on AT&T where none otherwise existed.

See id.

AT&T appealed to the D.C. Circuit, which ruled that the FCC clearly erred in ruling that Section 2.1.8 of AT&T Tariff FCC No. 2 did not apply, and declined to address the remaining issues, as follows:

> In sum, the FCC clearly erred in ruling that Section 2.1.8 of AT&T Tariff FCC No. 2 does not apply to a transfer of "traffic." As this was a threshold determination in the FCC's order, we do not reach the remaining issues addressed by the Commission and argued by the parties before us. We also do not decide precisely which obligations should have been transferred in this case, as this question was neither addressed by the Commission nor adequately presented to us. All we decide is that Section 2.1.8 cannot be read to allow parties to transfer the benefits associated with 800 service without assuming any obligations. The petition for review is granted.

AT&T Corp. v. FCC, No. 03-1431 (D.C. Cir. January 14, 2005) (Exhibit "7", p. 11). (emphasis added).

2. Nature of Illegal Penalty Contentions

Mr. Okin summarizes this contention in his email of February 15, 2006, as follows:

> 3) The FCC recently ruled that ATT acted in an illegal way pertaining to applying shortfall charges, this was an act of fraud, also ATT committed mail fraud by utilizing the U.S. Postal service.

See email annexed hereto as Exhibit "11".

Mr. Inga elaborates on the Illegal Penalty Contention in his statement. *See* Inga Statement (Exhibit "10", pp. 33-40). The gist of Mr. Inga's contention regarding illegal penalties proceeds as follows:

1. Since the FCC's 2003 ruling in the *Combined Companies, Inc.* case accepted that "AT&T had neither proprietary interest in these individual end-user locations [800 Services' customers] nor an expectation of revenue from them" (Exhibit "6", pp. 7-8, n. 52), Mr. Okin contends that "[t]hus AT&T was prohibited from collecting any amounts of money from the end-users in excess of the discounts that the CSTPII/RVPP plan provided the end-user." *See* Inga

Statement (Exhibit "10", pp. 33); and

2. Since AT&T imposed shortfall and termination charges directly on the end-user locations, 800 Services' customers, Mr. Inga contends that AT&T availed itself of an illegal remedy in violation of the Communication Act. *See* Inga statement, pp. *See* Inga Statement (Exhibit "10", pp. 33-40).

3. Application of the law to Mr. Inga's Illegal Penalty Contentions

Mr. Inga's "Illegal Penalty contentions" constitute new legal arguments only since they are not based on any new facts pertaining to 800 Services: the underlying facts were disclosed to the District Court and reviewed by the Third Circuit; namely, that AT&T collected shortfall and termination penalties which it claimed were owed by 800 Services directly from 800 Services' customers. *See 800 Services, Inc. v. AT&T Corp.*, No. 98-1539 (D.N.J. Aug. 28, 2000), *aff'd*, 2002 WL 215625 (3d Cir. Feb. 12, 2002) (Exhibit "3", p. 7).

In fact, the District Court expressly interpreted the tariff as permitting AT&T to apportion said charges among 800 Services' customers, as follows:

> Tariff No. 2 further provides that the customer will incur "shortfall" charges in the event that it does not satisfy its Minimum Revenue Commitment and "termination" charges if it discontinues service before the completion of the term. See Id. Tariff No. 2 also provides that, in the event any shortfall or termination charges are incurred under a CSTP II Plan, such charges shall be apportioned among the accounts aggregated under the plan according to usage and billed to the individual aggregated locations designated by the customer. See id.

See id. (Exhibit "3", p. 7) (emphasis added).

Further, the District Court expressly found the following with respect to shortfall charges:

> The record reveals that Okin then embarked upon a series of "strategies" seemingly aimed at avoiding the shortfall charges which, incidentally, Okin believed he did not have to pay. *See Okin Dep.* at page 166, lines 3-10.
> ....

> 800 Services also alleges that AT&T wrongfully collected revenue from end-user customers without giving 800 Services its share of the profits. However, 800 Services offers no evidence to support this allegation.

See id. (Exhibit "3", p. 9) (emphasis added).

Now, Mr. Inga is basing his contentions that AT&T was prohibited from collecting any amounts from the end-users in excess of the discounts that the CSTPIIRVPP plan offered on the FCC decision in the *Combined Companies, Inc.* as authority, which was issued approximately three years after final judgment was entered in the subject case. These contentions are not warranted by existing law, however, as a basis for reopening the subject case, which has been closed for over five years. Moreover, to some extent these contentions are based on a misunderstanding of the workings of the common law system.

First, Mr. Inga's new legal theory based on an "Illegal Remedy" was required to have been presented when the summary judgment motion was argued in the District Court. *See, e.g., McConccha v. Blue Cross and Blue Shield Mutual of Ohio*, 930 F. Supp. 1182, 1184 (N.D. Ohio 1996) (holding a court should not consider a new legal theory even on a motion for reconsideration which could have been presented on the original motion, taking into account due diligence).

Second, even if the plaintiff's failure to raise these arguments could be excused, and even assuming that this new legal theory is valid: misapplication of the law by the court is a matter to be addressed by appeal, so that an error of law by the District Court does not constitute extraordinary circumstances justifying relief under Fed. R. Civ. P. 60. *See Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 628-29 (7th Cir. 1997) (incorrect interpretation of law by federal court did not justify relief from federal judgment under Fed. R. Civ. P. 60(b)). Moreover, since the 800 Services did not petition the FCC for a legal interpretation of the issues

pertaining to the tariff, as the petitioners in the Account Movement Case were ordered to do: 800 Services is hardly in a position to now attack the District Court's judgment on these issues, particularly since it already appealed these issues to the Third Circuit.

Third, even if we assume the FCC decision caused a change in the law: a change in the governing law is not an extraordinary circumstance justifying relief from judgment under Rule 60(b). *See Kansas Pub. Employees Retirement Sys. V. Reimer & Koger Assocs.*, 194 F.3d 922, 925-26 (9th Cir. 1999). This is one of the fundamental underpinnings of the common law system; namely, that the law changes over time even though judgments which would have been decided differently do not change. For example, even a change of law by a subsequent Supreme Court decision does not justify granting relief from a judgment. *See Norgaard v. DePuy Orthopaedics, Inc.*, 121 F.3d 1074, 1075-76 (7th Cir. 1997).

Fourth, the FCC decision cited by Mr. Inga (Exhibit "6") does not unequivocally stand for the proposition for which Mr. Inga cites the decision. Specifically, the FCC did not rule on the issue of whether the shortfall and termination penalties were appropriate under the subject tariff; instead, the FCC simply ruled on the issue of "whether section 2.1.8 of AT&T's Tariff FCC No. 2 permits an aggregator to transfer traffic under a tariffed plan without transferring the plan itself in the same transaction". *See* FCC decision (Exhibit "6"). Further, the D.C. Circuit ruled that the FCC clearly erred in ruling that Section 2.1.8 of AT&T Tariff FCC No. 2 did not apply, and declined to address the remaining issues. *See AT&T Corp. v. FCC,* No. 03-1431 (D.C. Cir. January 14, 2005) (Exhibit "7", p. 11).

Fifth, the premise of Mr. Inga's contention--that the application of the FCC's holding in the FCC decision (Exhibit "6") would result in a different outcome in the subject case because said decision established that AT&T had neither proprietary interest in these individual end-user

locations (800 Services' customers) nor an expectation of revenue from them is undercut by the fact that the District Court, itself, already assumed that "the customers whose usage 800 Services aggregated were direct customers of 800 Services, not of AT&T." *See 800 Services, Inc. v. AT&T Corp.*, No. 98-1539 (D.N.J. Aug. 28, 2000), *aff'd*, 2002 WL 215625 (3d Cir. Feb. 12, 2002) (Exhibit "3", pp. 2-3) (citing Complaint, ¶10) (emphasis added).

Sixth, by its nature, the "Illegal Penalties" contention can not even be considered a fraud since the "Illegal Penalties" contention is based on a new legal theory applied to facts which were disclosed to the District Court. However, even if it could somehow be considered a "fraud" it would be covered by Fed. R. Civ. P. 60(b), which bars vacating a judgment after one year even based on fraud--since this "Illegal Penalties" contention can not meet the "demanding standard" set forth by the Third Circuit in *Herring*, which requires that "the fraud on the court must constitute "egregious misconduct . . . such as bribery of a judge or jury or fabrication of evidence by counsel." *See Herring v. United States*, 424 F.3d 384 (3d Cir. 2005) (holding that "only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court") (quoting *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978) (emphasis added)).

Seventh, it should also be noted that to the extent that Mr. Inga's "Illegal Penalties" contention alleges a violation of the Communications Act, the District Court expressly held that Counts Eleven and Twelve (§§ 201, 202, and 203 of the Communications Act) were barred by the statute of limitations since the wrongful actions alleged took place more than two years prior to the filing of the complaint. *See 800 Services, Inc. v. AT&T Corp.*, No. 98-1539 (D.N.J. Aug. 28, 2000), *aff'd*, 2002 WL 215625 (3d Cir. Feb. 12, 2002) (Exhibit "3", pp. 13-16). Moreover, the Third Circuit affirmed this ruling, including the District Court's reasoning that the continuing

wrong doctrine asserted by the plaintiff was inapposite to this case. *See 800 Services, Inc. v. AT&T Corp.*, 2002 WL 215625 (3d Cir. Feb. 12, 2002) (Exhibit "4", p. 2). Hence, the outcome would not be different even taking into account the Illegal Penalty contentions, which means that these contentions do not warrant a reopening of the case pursuant to Fed. R. Civ. P. 60(b). *See, e.g., MCI Telecommunications Corp., v. Matrix Communications Corp.*, 135 F.3d 27, 35-37 (1st Cir. 1998) (relief from judgment was properly denied when newly discovered evidence was not likely to have changed outcome of action).

D. NON-TRANSFER OF TRAFFIC WITHOUT THE PLAN AS FRAUD ON THE COURT CONTENTION

1. Background of the Non-Transfer of Traffic Contention

This contention is based on the holding of the FCC decision, i.e., that an aggregator was permitted to transfer "traffic" under the subject tariff without transferring the plan itself in the same transaction; and that AT&T's refusal to permit the transfer of traffic only--violated subsection 203(c) of the Communications Act. *See* FCC decision (Exhibit "6").

The complaint, itself, in the subject case expressly asserted that the facts alleged therein violated §§ 201, 202, and 203 of the Communications Act in Counts Eleven and Twelve of 800 Services' Complaint. *See* Complaint (Exhibit "1). Count Twelve is captioned "Violation of 47 U.S.C. §§ 201-203 and State and Federal Contract Law". *See id.* (Exhibit "1", p. 26). Paragraph 130 states:

> Defendant has violated the provisions of 47 U.S.C. §§ 201, 202 and 203 to include 203(c), AT&T's F.C.C. Tariff No. 2, and the contract obligations imposed on it by state and federal contract law, including the obligation of good faith and fair dealing, by among other things, ... refusing to permit plaintiff to transfer traffic to Contract Tariff 516.

See id. (emphasis added).

The District Court, however, held that Counts Eleven and Twelve were barred by the two year statute of limitations, pursuant to Section 415(b) of the Communication's Act, since "the most recent violation occurred no later than July 1995, which is more than two years prior to the filing of the Complaint." *See 800 Services, Inc. v. AT&T Corp.*, No. 98-1539 (D.N.J. Aug. 28, 2000), *aff'd*, 2002 WL 215625 (3d Cir. Feb. 12, 2002) (Exhibit "3", pp. 13-15). The Third Circuit affirmed.

2. Nature of the Non-Transfer of Traffic Contention

Based on the FCC's decision (Exhibit "6") (that an aggregator was permitted to transfer "traffic" under the subject tariff without transferring the plan itself in the same transaction, and AT&T violated subsection 203(c) of the Communications Act by refusing such transfers), Mr. Inga contends:

> 3) It has just been discovered in 2006 that due to the DC Court decision in 2005 that AT&T violated Section 203 of the Communications Act by failing to allow 800 Services, Inc to transfer its traffic only without the plan to another AT&T plan as outlined as the first priority in the Phil Okin deposition.

Inga Statement (Exhibit "10", p. 49) (emphasis added).

Further, Mr. Inga alleges that certain "newly discovered documents" show that "AT&T was not allowing traffic only transfers but were allowing transfers of the entire plan." *See* Exhibit "16", an email dated February 23, 2006 from Mr. Inga, with attachment; and Exhibit "17", a second attachment received in an email from Mr. Inga also dated February 23, 2006.

3. Application of the law to Non-Transfer of Traffic Contention

Note that Count Twelve, Paragraph 130, of the Complaint expressly alleged a violation of "47 U.S.C. §§ 201, 202 and 203 to include 203(c)" based, *inter alia*, on AT&T "refusing to permit plaintiff to transfer traffic to Contract Tariff 516". *See id.* (Exhibit "1", p. 26). Consequently, as with the "Illegal Penalty contentions" based on the FCC decision (Exhibit "6"),

this Non-Transfer of Traffic contention constitutes a new legal theory in support of Counts Eleven and Twelve of 800 Services' Complaint only; namely, that given the FCC's reasoning in the FCC decision in 2003 (Exhibit "6"), approximately three years after judgment was entered in the subject case, AT&T violated subsection 203(c) of the Communications Act by maintaining the policy of refusing such transfers when Mr. Okin was considering making such a transfer. Moreover, Mr. Inga cites Mr. Okin's deposition for this contention, i.e., "as outlined as the first priority in the Phil Okin deposition", thereby showing by definition that the underlying facts were disclosed to the District Court. Inga Statement (Exhibit "10", p. 49). This new legal theory contention is not warranted by existing law, however, as a basis for reopening the subject case, which has been closed for over five years.

First, Mr. Inga's new legal theory based on the Non-Transfer of Traffic was required to have been presented when the summary judgment motion was argued in the District Court. *See, e.g., McConccha v. Blue Cross and Blue Shield Mutual of Ohio*, 930 F. Supp. 1182, 1184 (N.D. Ohio 1996) (holding a court should not consider a new legal theory even on a motion for reconsideration which could have been presented on the original motion, taking into account due diligence).

Second, even if the plaintiff's failure to raise these arguments could be excused, and even if this new legal theory were accepted, this new legal theory and purported "newly discovered documents" do not change the District Court's finding that "the most recent violation occurred no later than July 1995, which is more than two years prior to the filing of the Complaint." Hence, this new legal theory would not change the District Court's holding that Counts Eleven and Twelve of 800 Services' Complaint (alleging violations of §§ 201, 202, and 203 of the Communications Act) are barred by pursuant to Section 415(b) of the Communications Act.

Therefore, since it would not likely have changed the outcome in the District Court, it is not grounds for reopening the case. *See, e.g., MCI Telecommunications Corp. v. Matric Communications Corp.*, 135 F.3d 27, 35-37 (1st Cir. 1998) (relief from judgment was properly denied when newly discovered evidence was not likely to have changed outcome of action).

Third, even if we presume that the District Court misapplied the law with respect to the statute of limitations, as noted *supra*: misapplication of the law by the court is a matter to be addressed by appeal, so that an error of law by the District Court does not constitute extraordinary circumstances justifying relief under Fed. R. Civ. P. 60. *See Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 628-29 (7th Cir. 1997) (incorrect interpretation of law by federal court did not justify relief from federal judgment under Fed. R. Civ. P. 60(b)). Moreover, since 800 Services did not petition the FCC for a legal interpretation of the issues pertaining to the tariff, as the petitioners in the *Combined Companies, Inc.* case were ordered to do: 800 Services is hardly in a position to now attack the District Court's judgment on these issues, particularly since it already appealed these issues to the Third Circuit.

Fourth, even if we assume the FCC decision caused a change in the law: a change in the governing law is not an extraordinary circumstance justifying relief from judgment under Rule 60(b). *See Kansas Pub. Employees Retirement Sys. V. Reimer & Koger Assocs.*, 194 F.3d 922, 925-26 (9th Cir. 1999). As noted *supra*, this is one of the fundamental underpinnings of the common law system; namely, that the law changes over time even though judgments which would have been decided differently do not change. *See, e.g., Norgaard v. DePuy Orthopaedics, Inc.*, 121 F.3d 1074, 1075-76 (7th Cir. 1997).

Fifth, the D.C. Circuit ruled that the FCC clearly erred in ruling that Section 2.1.8 of AT&T Tariff FCC No. 2 did not apply, and declined to address the remaining issues. *See AT&T*

Corp. v. FCC, No. 03-1431 (D.C. Cir. January 14, 2005) (Exhibit "7", p. 11). Hence, the law is not as settled as Mr. Inga claims.

Sixth, to the extent that these contentions regarding the Non-Transfer of Traffic Contention could be based on "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)", or are based on "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party": these contention are barred by the one year time limit of Fed. R. Civ. P. 60(b) which expressly mandates that any such motions be made "not more than one year after the judgment, order, or proceeding was entered or taken"--since the final judgment was entered on or about September 18, 2000. *See* docket (doc. no. 53) (Exhibit "2", p. 6).

Finally, as with the "Illegal Penalties" contention: by its nature, the Non-Transfer of Traffic contention can not even be considered a fraud since the Non-Transfer of Traffic contention is based on a new legal theory applied to facts which were disclosed to the District Court. However, even if it could somehow be considered a "fraud" it would be covered by Fed. R. Civ. P. 60(b), which bars vacating a judgment after one year even based on fraud--since this Non-Transfer of Traffic contention can not meet the "demanding standard" set forth by the Third Circuit in *Herring*, which requires that "the fraud on the court must constitute "egregious misconduct . . . such as bribery of a judge or jury or fabrication of evidence by counsel." *See Herring v. United States*, 424 F.3d 384 (3d Cir. 2005).

E. CONTENTIONS RELATING TO §§ 201, 202, and 203 of the Communications Act ("Communications Act Contentions")

1. Background of the Communications Act Contentions

As the District Court recognized, since AT&T is a common carrier regulated by

Communications Act of 1934, "it is required to provide its services to any person upon reasonable request on terms that are just, reasonable, and nondiscriminatory. *See* 47 U.S.C. § 201; 47 U.S.C. § 202(a) (West 2000)." *See 800 Services, Inc. v. AT&T Corp.*, No. 98-1539 (D.N.J. Aug. 28, 2000), *aff'd*, 2002 WL 215625 (3d Cir. Feb. 12, 2002) (Exhibit "3", pp. 3-4). Hence, AT&T is legally obligated to comply with the requirements of the Communications Act. Moreover, "in order not to violate the Act's prohibition against discrimination, the carrier must then make the contract tariff generally available to other similarly situated customers. *See id.* (citing Interstate Interexchange Marketplace at ¶¶91, 129)." *See id.* (Exhibit "3", p. 6).

As noted *supra*, the District Court held that Counts Eleven and Twelve were barred by the two year statute of limitations, pursuant to Section 415(b) of the Communications Act, since "the most recent violation occurred no later than July 1995, which is more than two years prior to the filing of the Complaint." *See id.* (Exhibit "3", pp. 13-15). The Third Circuit affirmed. *800 Services, Inc. v. AT&T Corp.*, 2002 WL 215625 (3d Cir. Feb. 12, 2002) (Exhibit "4").

2. Nature of Okin and Inga's Communications Act Contentions

Apart from the allegations *supra* which relate to the Communications Act, Mr. Inga alleges that there is now newly discovered evidence which shows that AT&T harmed 800 Services by violating §§ 202, and 203 of the Communications Act, as follows:

> 1) It has just been discovered that AT&T violated Section 203 of the Communications Act by not allowing 800 Services, Inc to restructure its CSTPII/RVPP plan in accordance with its tariff provision "Discontinuation Without Liability" for plans with ID's issued prior to June 17th 1994.
>
> 2) It has just been discovered that AT&T violated section 202 of the Communications Act by participating in Discrimination against 800 Services, Inc. regarding restructuring its plans. Aggregators such as the Inga Companies and Combined Companies Inc were allowed to restructure their plans using the same paper work and in the same fashion after June 17th 1994 (March of 1995) and AT&T did not impose shortfall and or termination charges against their plans but did against 800 Services, Inc.

....

4) It has just been discovered in 2006 that AT&T waived the shortfall charges for Combined Companies Inc, in July of 1997 and therefore Discriminated against 800 Service under Section 202 of the Communications Act.

Inga Statement (Exhibit "10", p. 49) (emphasis added).

In addition, Mr. Inga also asserted a §202 violation based on the following:

See Exhibit F

This was a restructure that was done for Winback and Conserve Program in March of 1995 but was not done for 800 Services. Discrimination under Section 202 of the Act. New Discovery issue.

The same paper work was filled out the same way by 800 Services, Inc. in Exhibit G.

No shortfall charges were hit on the Winback plans in 1995.

See email from Mr. Inga of February 14, 2006 (Exhibit "18").

In addition, Mr. Inga also alleged the following in an email:

It has been discovered by 800 Services, Inc in July 2006 that another aggregator Winback & Conserve with the same CSTPII/RVPP discount plans as 800 Services, Inc., was allowed by AT&T to restructure its plan 3782 as indicated at exhibit F, but 9 additional plans throughout 1995 and up till June of 1996."

See email from Mr. Inga, 2/23/2006 (Exhibit "19").

3. Application of the law to the Communications Act Contentions

As a preliminary matter, it should be noted that these contentions that AT&T violated §§ 202, and 203 of the Communications Act by refusing to restructure 800 Services' plan and discriminating against 800 Services, as articulated by Mr. Inga, appear to relate to Counts Eleven and Twelve of the Complaint for *res judicata* purposes. Counts Eleven and Twelve of the Complaint allege violations of §§ 201, 202, and 203 of the Communications Act. *See* Complaint (Exhibit "1", pp. 25-27). Count Eleven is captioned "Discrimination and Unreasonable and

Unjust Practices by a Common Carrier in violation of 47 U.S.C. sections 201, 202." *See id.* (Exhibit "1", p. 25). Paragraph 125 of the complaint states:

> In violation of 47 U.S.C. sections 201 and 202, defendant has unjustly and unreasonably discriminated against plaintiff by, among other things, providing plaintiff with less favorable charges, practices, classifications, regulations, facilities and services than those provided to defendant's non-reseller commercial customers. Moreover, in violation of 47 U.S.C. sections 201 and 202, defendant has intentionally subjected plaintiff to undue practices, prejudice and disadvantage.

See id. (Exhibit "1", p. 25) (emphasis added).

.

Count Twelve, captioned "Violation of 47 U.S.C. §§ 201-203 and State and Federal Contract Law", states at paragraph 130:

> Defendant has violated the provisions of 47 U.S.C. §§ 201, 202 and 203 to include 203(c), AT&T's F.C.C. Tariff No. 2, and the contract obligations imposed on it by state and federal contract law, including the obligation of good faith and fair dealing, by among other things, (i) providing inaccurate and misleading billing for plaintiff's customers, (ii) failing to account for monies collected from plaintiff's customers; (iii) making improper deductions from remittances, (iv) wrongfully withholding commission payments, (v) conducting its relationship with plaintiff in a manner that defendant knew, or should have known, would prevent plaintiff from fulfilling tariff commitments and being able to aggregate defendant's 800 services, (vi) refusing to enter into contract tariffs with plaintiff directly and, (vii) refusing to permit plaintiff to transfer traffic to Contract Tariff 516.

See id. (Exhibit "1", p. 26) (emphasis added).

Moreover, as noted *supra*, the District Court found that "800 Services never attempted to proceed with" the restructure request, as follows:

> In or about July 21, 1995, 800 Services then attempted to 'restructure' its CSTP II Plan. By letter dated July 25, 1995, AT&T responded to 800 Services's request to restructure its CSTP II Plan and outlined the terms and conditions specified under Tariff No. 2 that were applicable to this request. *See* Solomon Cert., Exhibit I. Specifically, AT&T advised 800 Services that under the tariff, if 800 Services restructured its existing CSTP II Plan, 800 Services would remain liable under the tariff for any shortfall charges accrued in the first year of its plan and, in the event that 800 Services failed to satisfy its Minimum Annual Commitment for the first year of the existing plan, it would also be required to

> repay the promotional credits paid to 800 Services under the plan. *See id.* AT&T advised 800 Services to notify it if 800 Services wished to proceed with this request. *See id.* 800 Services never attempted to proceed with this request. See Okin Dep. at page 94, line 7-10. In fact, Okin testified that 800 Services did not qualify for a restructuring of its plan under the terms of the governing tariff. See Okin Dep. at page 134, lines 7-11.

See 800 Services, Inc. v. AT&T Corp., No. 98-1539 (D.N.J. Aug. 28, 2000), *aff'd*, 2002 WL 215625 (3d Cir. Feb. 12, 2002) (Exhibit "3", pp. 10-11) (emphasis added).

Therefore, since these Communications Act Contentions appear to be included in Counts Eleven and Twelve of the Complaint, they are *res judicata*, since the District Court granted AT&T summary judgment as to Counts Eleven and Twelve with prejudice. *See, e.g., Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979). Moreover, since they are *res judicata*, the case would have to be reopened in order to proceed with these contentions. These Communications Act contentions, however, do not appear to be warranted by existing law as a basis for reopening the subject case.

First, even if we assume that this "newly discovered evidence" relating to the Communications Act establish violations of said act: Fed. R. Civ. P. 60(b) bars the reopening of the subject case because the one year bar imposed by Fed. R. Civ. P. 60(b) expressly applies to "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)". *See* Fed. R. Civ. P. 60(b).

Second, even if it were possible to get past the one year bar for newly discovered evidence pursuant to Fed. R. Civ. P. 60(b), this newly discovered evidence does not change the District Court's finding that "the most recent violation occurred no later than July 1995, which is more than two years prior to the filing of the Complaint." Hence, this newly discovered evidence would not change the District Court's holding that Counts Eleven and Twelve of 800 Services' Complaint (alleging violations of §§ 201, 202, and 203 of the Communications Act)

are barred by Section 415(b) of the Communications Act. Therefore, this contention does not warrant reopening the case pursuant to Fed. R. Civ. P. 60(b). *See, e.g., MCI Telecommunications Corp., v. Matrix Communications Corp.*, 135 F.3d 27, 35-37 (1st Cir. 1998) (relief from judgment was properly denied when newly discovered evidence was not likely to have changed outcome of action).

Third, even if we presume that the District Court misapplied the law with respect to the statute of limitations, as noted *supra*: misapplication of the law by the court is a matter to be addressed by appeal, so that an error of law by the District Court does not constitute extraordinary circumstances justifying relief under Fed. R. Civ. P. 60. *See Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 628-29 (7th Cir. 1997) (incorrect interpretation of law by federal court did not justify relief from federal judgment under Fed. R. Civ. P. 60(b)).

Finally, by their nature, these Communications Act Contentions can not even be considered a fraud since these contentions are purportedly based on new evidence which was "newly discovered". However, even if it could somehow be considered a "fraud" it would be covered by Fed. R. Civ. P. 60(b), which bars vacating a judgment after one year even based on fraud--since this Non-Transfer of Traffic contention can not meet the "demanding standard" set forth by the Third Circuit in *Herring*, which requires that "the fraud on the court must constitute "egregious misconduct . . . such as bribery of a judge or jury or fabrication of evidence by counsel." See *Herring v. United States*, 424 F.3d 384 (3d Cir. 2005).

F. Discovery

1. Nature of Discovery Contention

Mr. Okin and Mr. Inga assert that a number of discovery requests in the subject litigation were not complied with by AT&T. Mr. Inga summarizes the discovery contentions in his

statement as follows:

> 5) It has just been discovered in July 2006 by 800 Services Inc., that AT&T intentionally withheld material discovery evidence despite several requests that would have enabled 800 Services, Inc. to enact the Continuing Wrong Doctrine.

Inga Statement (Exhibit "10", p. 49) (emphasis added).

Mr. Okin identifies the interrogatories which 800 Services propounded on AT&T as a basis for these discovery contentions. A copy of said interrogatories are annexed hereto as Exhibit "20". Mr. Okin summarizes the discovery contentions as follows:

> 4) The fact that interrogatories questions requesting information not once but infact twice were ignored. I have recently discovered from Al Inga numerous letters from Larry Shipp to ATT, these letters show he played dumb during his deposition, ATT failed to provide documentation that Shipp was compensated.

See email (Exhibit "11") (emphasis added).

Mr. Okin identifies the following interrogatories, in particular:

> #4 Asks ATT for any documents/letters made by any party against ATT to be provided, ATT refuses to answer this question.
>
> #8 ATT is asked to produce all documents created by defendent that relate to this action, ATT refuses to answer this question.
>
> #9 ATT is asked to provide any and all agreements, contracts which indicate business relations between any and all parties, ATT refuses to answer this question, although we later find out that Shipp had indeed had a contract to settle with ATT, this settlement included a large payment to Shipp.
>
> #22 ATT is asked to provide any and all documents, including but not limited to checks, canceled checks, money orders, receipts, debits, credits, accounts or other similar documents, indicating any monetary payment from any party to this action to any other party in this action. ATT compensated Shipp and never disclosed this to the court, he was a paid off witness.
>
> #27 ATT is asked if there ar any other complaints similar to mine filed with the court, ATT recieved numerous complaints from Shipp, these letters should have been produced to the court, but they never were. ATT did not answer this question at all....
>
> #42 ATT is asked for any and all documents relating to any person that contracted

> with defendent pursuant to 800 services specific term plan/2 commitment form and requested transfer to contract tariff 516. ATT simply again refused to answer the question.
>
> AL it appears that Lawrence Coven went back to the court a couple of times to get these questions answered, and each time ATT simply refuses to comply...

See email from Okin, forwarded in Mr. Inga's email of February 7, 2006, attached hereto as Exhibit "21".

2. Application of the law to Discovery Contentions

Since the other contentions discussed above do not warrant reopening this case under existing law, these discovery contentions must be considered on their own merits. Based on current law, standing alone these discovery contentions warrant reopening the subject case.

First, with respect to AT&T's alleged blatant failure to comply with 800 Services' discovery requests (as Mr. Okin indicates: "Lawrence Coven went back to the court a couple of times to get these questions answered, and each time ATT simply refuses to comply"), the burden was on AT&T to bring the appropriate motion to compel AT&T to comply with its discovery requests, or for appropriate sanctions. However, any such motion must be made on a timely basis, or it is waived. *See, e.g., Mathis v. John Morden Buick, Inc.,* 136 F.3d 1153, 1155-66 (7th Cir.), *cert. denied*, 525 U.S. 898 (1998) (plaintiff's failure to move for sanctions for defendant's deliberate spoliation of documentary evidence precluded application of sanctions); *Doe v. National Hemopholia Found*, 194 F.R.D. 516, 519 (D. Md. 2000) (denying motion to compel when movant did not comply with local rules as to informal resolution and 30-day time limit for such motions); *Gault v. Nabisco Biscuit Co.*, 184 F.R.D. 620, 622 (D. Nev. 1999) (motion to compel filed more than four months after response due and after close of discovery was untimely).

Second, to the extent that these discovery contentions refer to "newly discovered

evidence" relating to Mr. Shipp: Fed. R. Civ. P. 60(b) bars the reopening of the subject case on this basis because the one year bar imposed by Fed. R. Civ. P. 60(b) expressly applies to "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)". *See* Fed. R. Civ. P. 60(b).

Third, even if the noncompliance with discovery requests could be considered sufficient misconduct under Fed. R. Civ. P. 60(b)(3) to warrant reopening the case, the one year time limit applicable to Fed. R. Civ. P. 60(b)(3) would now bar the motion to reopen. *See* Fed. R. Civ. P. 60(b)(3). Moreover, the misconduct alleged in this contention can not meet the "demanding standard" set forth by the Third Circuit in *Herring*, which requires that "the fraud on the court must constitute "egregious misconduct . . . such as bribery of a judge or jury or fabrication of evidence by counsel." See *Herring v. United States*, 424 F.3d 384 (3d Cir. 2005).

Fourth, even if a motion to reopen had been filed within one year of the final judgment, consideration of the new evidence must be likely to produce a different outcome in order for newly discovered evidence to be basis for reopening the case pursuant to Fed. R. Civ. P. 60(b). *See, e.g., MCI Telecommunications Corp. v. Matric Communications Corp.*, 135 F.3d 27, 35-37 (1st Cir. 1998) (relief from judgment was properly denied when newly discovered evidence was not likely to have changed outcome of action). In the subject case, it is not clear that any of the evidence relating to Mr. Shipp would have likely produced a different outcome since (a) the District Court granted summary judgment to AT&T on Counts Eleven and Twelve (§§ 201, 202, and 203 of the Communications Act) based on the statute of limitations, and (b) the District Court granted summary judgment to AT&T on Counts Seven and Eight (Intentional Interference with Prospective Economic Advantage and Intentional Interference with Contractual Relations), relating to the purported restructure and transfer based on Mr. Okin's own testimony. *See 800*

Services, Inc. v. AT&T Corp., No. 98-1539 (D.N.J. Aug. 28, 2000), *aff'd*, 2002 WL 215625 (3d Cir. Feb. 12, 2002) .

G. STATUTE OF LIMITATIONS CONTENTION

1. Nature of Statute of Limitations Contention

Mr. Inga contends that Section 415(d) of the Communication Act provides a ground "to reopen old claims" in the subject case based on the payments that 800 Services has made to AT&T pursuant to the judgment which the District Court entered against 800 Services as follows:

> 7) In addition to the above reason to reopen old claims the case 800 Services, Inc's Statute of Limitations has been extended due to Section 415 D of the Communications Act. § 415. Limitations of actions
>
> (a) Recovery of charges by carrier
>
> > All actions at law by carriers for recovery of their lawful charges, or any part thereof, shall be begun within two years from the time the cause of action accrues, and not after.
>
> (b) Recovery of damages
>
> > All complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subsection (d) of this section.
>
> (c) Recovery of overcharges
>
> > For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers within two years from the time the cause of action accrues, and not after, subject to subsection (d) of this section, except that if claim for the overcharge has been presented in writing to the carrier within the two-year period of limitation said period shall be extended to include two years from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.
>
> (d) Extension
>
> > If on or before expiration of the period of limitation in subsection (b) or

> (c) of this section a carrier begins action under subsection (a) of this section for recovery of lawful charges in respect of the same service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the carrier.

Inga Statement (Exhibit "10", p. 50) (emphasis added).

With respect to § 415(d) of the Communications Act, the District Court expressly noted that this provision was inapplicable to the subject case, and 800 Services did not dispute this point, as follows:

> Incidentally, there is no dispute that, based on the facts of this case, this provision [§ 415(d) of the Communications Act] does not apply.

See 800 Services, Inc. v. AT&T Corp., No. 98-1539 (D.N.J. Aug. 28, 2000), *aff'd*, 2002 WL 215625 (3d Cir. Feb. 12, 2002) (Exhibit "3", p. 14, n. 4) (emphasis added).

As a preliminary matter, and as discussed *supra*, Counts Eleven and Twelve of the Complaint allege violations of §§ 201, 202, and 203 of the Communications Act. *See* Complaint (Exhibit "1", pp. 25-27). Count Eleven, ¶125 of the complaint states:

> In violation of 47 U.S.C. sections 201 and 202, defendant has unjustly and unreasonably discriminated against plaintiff by, among other things....

See id. (Exhibit "1", p. 25).

Count Twelve, paragraph 130 states:

> Defendant has violated the provisions of 47 U.S.C. §§ 201, 202 and 203 to include 203(c), AT&T's F.C.C. Tariff No. 2, and the contract obligations imposed on it by state and federal contract law, including the obligation of good faith and fair dealing, by among other things, ...

See id. (Exhibit "1", p. 26).

Consequently, it would appear that any new allegations relating to violations of §§ 201, 202, and 203 of the Communications Act by 800 Services against AT&T during the time period in question are *res judicata* since the District Court granted summary judgment for AT&T and

against 800 Services. *See, e.g., Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979). Therefore, it would be necessary to reopen the case in order for 800 Services to proceed with any claims against AT&T, relating to the time period in question, pursuant to §§ 201, 202, and 203 of the Communications Act.

However, Mr. Inga's contention that § 415(d) of the Communications Act provides a ground to reopen the subject case is not warranted by existing law because the District Court held that Counts Eleven and Twelve of the Complaint are barred by the statute of limitations and the Third Circuit affirmed. *See 800 Services, Inc. v. AT&T Corp.*, No. 98-1539 (D.N.J. Aug. 28, 2000), *aff'd*, 2002 WL 215625 (3d Cir. Feb. 12, 2002) (Exhibit "3") . Moreover, even if the District Court erred in failing to apply § 415(d) of the Communication Act: misapplication of the law by the court is a matter to be addressed by appeal, so that an error of law by the District Court does not constitute extraordinary circumstances justifying relief under Fed. R. Civ. P. 60. *See Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 628-29 (7th Cir. 1997) (incorrect interpretation of law by federal court did not justify relief from federal judgment under Fed. R. Civ. P. 60(b)).

H. TAX LAW VIOLATIONS CONTENTION

Mr. Inga also makes certain contentions based on alleged tax law violations by AT&T, as follows: "AT&T failed to charge Federal excise tax and State sales tax on the shortfall contrary to the tax law due to the charges being manually manufactured." *See* Inga Statement (Exhibit "10", pp. 50-51) (emphasis added).

800 Services, however, does not have standing to recover for tax law violations.

CONCLUSION

For all of the foregoing reasons, the contentions made by Mr. Inga and Mr. Okin to reopen the subject federal case, which has been closed for over five years, do not appear to be warranted by existing law, based on the evidence presented and summarized in Mr. Inga's Statement (Exhibit "10").

Note: all of the following are beyond the scope of this memorandum: (a) considering any contentions based on evidence which has not been presented; (b) speculating on the existence of any evidence which has not been obtained; (c) proposing any strategy for obtaining additional evidence.

Respectfully submitted,

Fred Shahrooz Scampato, Esq.

Lawrence S. Coven (L.S.C. 9572)
THE LAW OFFICES OF LAWRENCE S. COVEN
314 U.S. Highway 22 West
Suite E
Green Brook, N.J. 08812
(732) 424-1000
Attorneys for Plaintiff, 800 SERVICES, INC.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

800 SERVICES, INC. a New Jersey corporation, Plaintiff, v. AT&T CORP., a New York corporation, Defendant.	CIVIL ACTION NO. 98-1539 (WHW) COMPLAINT

Plaintiff, 800 Services Inc. (hereinafter "plaintiff"), having its principal place of business at 17 North Fairview Avenue, Paramus, state of New Jersey, by and through its attorneys, The Law Offices of Lawrence S. Coven, complaining of defendant, AT&T Corp. (hereinafter "defendant"), says:

PARTIES AND JURISDICTION

1. Plaintiff is a corporation organized and existing under the laws of the State of New Jersey, having its principal place of business at 17 North Fairview, Paramus, state of New Jersey.

2. Defendant is a corporation organized and existing under the laws of the State of New York, having its principal place of business at 32 Avenue of the Americas, New York, state of New

York.

3. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1332 because this action arises under the Communications Act of 1934, 47 U.S.C. § 151 et seq., and because there is diversity of citizenship among the plaintiff and defendant and the amount in controversy exceeds Seventy Five Thousand Dollars ($75,000.00), exclusive of interest and costs. This Court further has supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over plaintiff's state claims.

4. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because defendant resides in this District.

ALLEGATIONS COMMON TO ALL COUNTS

5. Plaintiff is a small business enterprise that pursuant to contract, AT&T tariff, rights provided by the Federal Communications Act of 1934, as amended 47 U.S.C. §§ 151, et seq. (1993) (hereinafter "FCA"), and policies of the Federal Communications Commission, Washington, D.C. (hereinafter "FCC"), committed to defendant to maintain the inbound 800 calling traffic primarily of small business customers on defendant's network facilities at volume levels specified by defendant's tariff filed with the FCC.

6. Plaintiff effected its commitment to maintain the inbound 800 calling traffic by entering into a written contract (hereinafter "contract") with defendant on August 2, 1994, for the sale of an "AT&T 800 Customer Specific Term Plan II (CSTP II)." The contract was entitled "Network Services Commitment Form." The term of the contract was from August 2, 1994 to August 2, 1997.

7. The result of completing the contract was to establish the plaintiff in an individual capacity as defendant's "customer of record" for the 800 calling traffic rendered by defendant.

8. The essence of the contract was as follows: defendant gave plaintiff a telephone usage rate lower than that which was available to the average end-user customer. In return for the below normal rate, plaintiff committed to "buy" or "use" three million dollars ($3,000,000.00) in telephone usage charges per year.

9. Plaintiff, according to its own business practices, contracted with 800 end-users to enlist them in the aggregation programs and included the 800 traffic volumes of the respective end-users as part of the traffic level commitment to defendant.

10. Defendant maintained a list of all customers who contracted with plaintiff. Defendant maintained account names and numbers for each of plaintiff's customers.

11. Any and all billing invoices sent to plaintiff's customers pursuant to charges incurred via use of 800 services were generated by defendant. The billing invoices used clearly displayed defendant's name, logos, contact telephone numbers and addresses. The billing invoices made no reference to any other company than defendant's.

12. Any and all payments made by plaintiff's customers pursuant to the billing invoices were sent directly to defendant and made payable to plaintiff.

13. Pursuant to the contract, plaintiff and defendant agreed to share in any revenue payable to defendant by plaintiff's customers. After plaintiff and defendant entered into the contract, defendant failed to share said revenue with plaintiff.

14. After plaintiff and defendant entered into the contract, defendant began to offer telephone usages rates to plaintiff's customers which were lower than those offered by plaintiff to its customers.

15. After plaintiff and defendant entered into the contract, Transtec Inc., a subsidiary of

defendant, began to repeatedly solicit plaintiff's customers by offering telephone usages rates to plaintiff's customers which were lower than those offered by plaintiff to its customers.

16. On or around June, 1995, plaintiff requested that certain of its customers' accounts be deleted from defendant's records. Defendant failed to delete from its billing list certain accounts concerning plaintiff's customers.

17. Defendant then sent billing invoices to these customers for "shortfall" charges, despite the fact that defendant had requested that their accounts be deleted. At the time defendant billed these customers, defendant knew that these customers were not responsible nor liable for payment of such charges. Defendant billed these customers despite a written demand by plaintiff not to do so.

18. Defendant failed to send any billing invoices to plaintiff for payment of any "shortfall" charges concerning plaintiff's customers accounts, as defendant was required to do under the terms of the contract and the applicable tariff.

19. Many of these customers were angered, upset and/or concerned when they received invoices for the "shortfall" charges. When plaintiff's customers telephoned defendant to inquire about the "shortfall" charges, defendant told plaintiff's customers that plaintiff refused to pay for any "shortfall" charges and plaintiff could not be trusted at running a business. Defendant told plaintiff's customers that plaintiff was the cause for, and/or had requested that defendant place the shortfall charges on the customers' bills.

20. After plaintiff and defendant entered into the contract, defendant limited the availability of new eight hundred (800) numbers to plaintiff.

21. On or around July, 1995, Plaintiff requested that the existing AT&T 800 Customer Specific Term Plan II (CSTP II), which was the subject of the contract, be transferred by defendant

to a new plan, commonly known as Tariff 516. This transfer was authorized by the terms of the contract. This request was denied by defendant.

22. Defendant claims that plaintiff owes defendant approximately one million, seven hundred thousand dollars ($1,700,000.00) in charges relating to the contract.

23. As a result of the above actions committed by defendant in paragraphs one (1) through (22), plaintiff lost its customers to defendant and/or was unable to obtain new customers. In addition, plaintiff lost revenue and profits, and suffered other monetary damages.

COUNT ONE

(Breach of Contract Under State and Federal Common Law)

24. Plaintiff repeats and realleges paragraphs one (1) through twenty-three (23) as if the same were set forth at length herein.

25. Plaintiff entered into the contract with defendant on August 2, 1994. Plaintiff committed to defendant to maintain the inbound 800 calling traffic primarily of small business customers on defendant's network facilities at volume levels specified by defendant.

26. Defendant failed to perform its obligations under the contract. Specifically:

a. Defendant failed to share revenue with plaintiff;

b. Defendant offered telephone usage rates to plaintiff's customers which were lower than those offered by plaintiff to its customers;

c. Defendant solicited plaintiff's customers without permission and used proprietary information of plaintiff, said information consisting of plaintiff's customer lists;

d. Defendant failed to delete certain customer accounts despite

plaintiff's request to do so;

e. Defendant billed plaintiff's customers for "shortfall" charges even though said customers were not liable for said charges;

f. Defendant failed to send any billing invoices to plaintiff for any "shortfall" charges concerning plaintiff's customers;

g. Defendant told plaintiff's customers that plaintiff refused to pay for any "shortfall" charges billed to said customers;

h. Defendant told plaintiff's customers that plaintiff could not be trusted at running a business;

i. Defendant told plaintiff's customers that plaintiff was the cause for, and/or had requested that defendant place the "shortfall" charges on said customers' bills;

j. Defendant limited the availability of new eight hundred (800) numbers to plaintiff, thereby limiting plaintiff's ability to obtain new customers;

k. Defendant failed to change the existing contract to a new plan, Tariff 516;

l. Defendant claims that plaintiff owes defendant approximately one million, seven hundred thousand dollars ($1,700,000.00) in charges relating to the contract.

27. The above actions committed by defendant constitute a breach of contract.

28. As a result of the above actions committed by defendant, plaintiff lost its customers

to defendant and/or was unable to obtain new customers. In addition, plaintiff lost revenue and profits, and suffered other monetary damages.

29. Defendant's conduct was willful, malicious, oppressive and fraudulent, and undertaken with wilful disregard for plaintiff's rights. Plaintiff is therefore entitled to an award of exemplary and punitive damages.

30. As a result of the foregoing actions committed by defendant, plaintiff has been damaged by not less than fifty million dollars ($50,000,000.00).

WHEREFORE, plaintiff demands judgment against the defendants for damages in excess of fifty million dollars, breach of contract damages, unliquidated damages, liquidated damages, compensatory damages, exemplary damages, special damages, general damages, punitive damages, litigation costs, attorney's fees and such equitable and legal relief as this Court deems just and proper in the circumstances.

COUNT TWO

(Breach of Covenant of Good Faith and Fair Dealing under State and Federal Common Law)

31. Plaintiff repeats and realleges paragraphs one (1) through thirty (30) as if the same were set forth at length herein.

32. Plaintiff entered into the contract with defendant on August 2, 1994. Plaintiff committed to defendant to maintain the inbound 800 calling traffic primarily of small business customers on defendant's network facilities at volume levels specified by defendant.

33. After entering into the contract, defendant committed willful, malicious, oppressive and fraudulent actions against plaintiff, said actions undertaken with wilful disregard for Plaintiff's

contractual rights. Specifically:

a. Defendant failed to share revenue with plaintiff;

b. Defendant offered telephone usage rates to plaintiff's customers which were lower than those offered by plaintiff to its customers;

c. Defendant solicited plaintiff's customers without permission and used proprietary information of plaintiff, said information consisting of plaintiff's customer lists;

d. Defendant failed to delete certain customer accounts despite plaintiff's request to do so;

e. Defendant billed plaintiff's customers for "shortfall" charges even though said customers were not liable for said charges;

f. Defendant failed to send any billing invoices to plaintiff for any "shortfall" charges concerning plaintiff's customers;

g. Defendant told plaintiff's customers that plaintiff refused to pay for any "shortfall" charges billed to said customers;

h. Defendant told plaintiff's customers that plaintiff could not be trusted at running a business;

i. Defendant told plaintiff's customers that plaintiff was the cause for, and/or had requested that defendant place the "shortfall" charges on said customers' bills;

j. Defendant limited the availability of new eight hundred (800) numbers to plaintiff, thereby limiting plaintiff's ability to

obtain new customers;

k. Defendant failed to change the existing contract to a new plan, Tariff 516;

l. Defendant claims that plaintiff owes defendant approximately one million, seven hundred thousand dollars ($1,700,000.00) in charges relating to the contract.

34. By committing the above acts, defendant breached the implied covenant of good faith and fair dealing.

35. As a result of the above actions committed by defendant, plaintiff lost its customers to defendant and/or was unable to obtain new customers. In addition, plaintiff lost revenue and profits, and suffered other monetary damages.

36. Defendant's conduct was willful, malicious, oppressive and fraudulent, and undertaken with wilful disregard for plaintiff's rights. Plaintiff is therefore entitled to an award of exemplary and punitive damages.

37. As a result of the foregoing actions committed by defendant, plaintiff has been damaged by not less than fifty million dollars ($50,000,000.00).

WHEREFORE, plaintiff demands judgment against the defendants for damages in excess of fifty million dollars, breach of contract damages, unliquidated damages, liquidated damages, compensatory damages, exemplary damages, special damages, general damages, punitive damages, litigation costs, attorney's fees and such equitable and legal relief as this Court deems just and proper in the circumstances.

COUNT THREE

(Fraud and Deceit Under State and Federal Common Law)

38. Plaintiff repeats and realleges paragraphs one (1) through thirty-seven (37) as if the same were set forth at length herein.

39. Defendant knowingly and with the intent to defraud and deceive plaintiff, falsely represented to plaintiff that it would share in all revenue collected pursuant to the terms of the contract.

40. Defendant knowingly and with the intent to defraud and deceive plaintiff, falsely represented to plaintiff that it would not solicit plaintiff's customers or contract with plaintiff's customers for defendant's financial gain.

41. Said representations made by defendant were false when made and defendant knew said representations were false because defendant did not intend to share said revenues and did intend to solicit plaintiff's customers for its financial gain.

42. Plaintiff justifiably relied on the false representations made by defendant and entered into the contract.

43. Defendant failed to share all revenues with plaintiff and did solicit plaintiff's customers for defendant's financial gain.

44. As a direct and proximate result of the above actions committed by defendant, plaintiff lost its customers to defendant and/or was unable to obtain new customers. In addition, plaintiff lost revenue and profits, and suffered other monetary damages.

45. Defendant's conduct was willful, malicious, oppressive and fraudulent, and

undertaken with wilful disregard for plaintiff's rights.

46. As a result of the foregoing actions committed by defendant, plaintiff has been damaged by not less than fifty million dollars ($50,000,000.00).

WHEREFORE, plaintiff demands judgment against the defendants for damages in excess of fifty million dollars, breach of contract damages, unliquidated damages, liquidated damages, compensatory damages, exemplary damages, special damages, general damages, punitive damages, litigation costs, attorneys fees and such equitable and legal relief as this Court deems just and proper in the circumstances.

COUNT FOUR

(Unjust Enrichment at the Prejudice and Expense of Plaintiff Under State and Federal Common Law)

47. Plaintiff repeats and realleges paragraphs one (1) through forty-six (46) as if the same were set forth at length herein.

48. Pursuant to the contract, plaintiff and defendant agreed to share in any revenue payable to defendant by plaintiff's customers. In addition, plaintiff provided defendant with a list of all of plaintiff's customers.

49. Plaintiff fully performed all of its obligations under the contract.

50. Defendant received the benefit of plaintiffs' contractual performance by collecting revenue from end-user customers for use of 800 services and obtaining a list of all of plaintiff's customers.

51. Defendant was unjustly enriched at the prejudice and expense of plaintiff because defendant failed to receive its share of the revenue. Defendant was also unjustly enriched at the

prejudice and expense of plaintiff because plaintiff utilized plaintiff's customer list to derive profits without sharing same with plaintiff or compensating plaintiff for use of said list.

52. Defendant's conduct was willful, malicious, oppressive and fraudulent, and undertaken with wilful disregard for plaintiff's rights.

53. As a result of the foregoing actions committed by defendant, plaintiff has been damaged by not less than fifty million dollars ($50,000,000.00).

WHEREFORE, plaintiff demands judgment against the defendants for damages in excess of fifty million dollars, breach of contract damages, unliquidated damages, liquidated damages, compensatory damages, exemplary damages, special damages, general damages, punitive damages, litigation costs, attorneys fees and such equitable and legal relief as this Court deems just and proper in the circumstances.

COUNT FIVE

(Slander Under State and Federal Common Law)

54. Plaintiff repeats and realleges paragraphs one (1) through fifty-three (53) as if the same were set forth at length herein.

55. Sometime after plaintiff and defendant entered into the contract, defendant orally published defamatory statements to third persons concerning plaintiff. Said statements include but are not limited to the following:

a. Defendant told plaintiff's customers that plaintiff refused to pay for any "shortfall" charges billed to said customers;

b. Defendant told plaintiff's customers that plaintiff could not be trusted at running a business;

c. Defendant told plaintiff's customers that plaintiff was the cause for, and/or had requested that defendant place the "shortfall" charges on said customers' bills.

56. Defendant published the above defamatory statements to accomplish the following objectives:

a. To lure customers away from plaintiff for the financial benefit of defendant;

b. To cause plaintiff to lose revenue;

c. To harm and diminish the business reputation of defendant.

57. The defamatory statements published by defendant concerned plaintiff; therefore, plaintiff was the person defamed.

58. The above defamatory statements exposed plaintiff to public contempt and ridicule, and has caused an unfavorable opinion of plaintiff in the minds of tradespeople, businesses and the public generally.

59. Defendant's publication of the above defamatory statements were wilful, malicious, reckless, in bad faith and intentional and done for the purpose of harassing, vexing, annoying and injuring the reputation of plaintiff.

60. Defendant's conduct was willful, malicious, oppressive and fraudulent, and undertaken with wilful disregard for plaintiff's rights.

61. As a result of the foregoing actions committed by defendant, plaintiff has been damaged by not less than fifty million dollars ($50,000,000.00).

WHEREFORE, Plaintiff demands judgment against the defendants for damages in excess

of fifty million dollars, breach of contract damages, unliquidated damages, liquidated damages, compensatory damages, special damages, general damages, exemplary damages, punitive damages, litigation costs, attorneys fees and such equitable and legal relief as this Court deems just and proper in the circumstances.

COUNT SIX

(Libel Under State and Federal Common Law)

62. Plaintiff repeats and realleges paragraphs one (1) through sixty-one (61) as if the same were set forth at length herein.

63. Sometime after plaintiff and defendant entered into the contract, defendant published defamatory statements to third persons concerning plaintiff via certain writings. Said statements include but are not limited to the following:

a. Defendant told plaintiff's customers that plaintiff refused to pay for any "shortfall" charges billed to said customers;

b. Defendant told plaintiff's customers that plaintiff could not be trusted at running a business;

c. Defendant told plaintiff's customers that plaintiff was the cause for, and/or had requested that defendant place the "shortfall" charges on said customers' bills.

64. Defendant published the above defamatory statements to accomplish the following objectives:

a. To lure customers away from plaintiff for the financial benefit of defendant;

b. To cause plaintiff to lose revenue;

c. To harm and diminish the business reputation of defendant.

65. The defamatory statements published by defendant concerned plaintiff; therefore, plaintiff was the person defamed.

66. The above defamatory statements exposed plaintiff to public contempt and ridicule, and has caused an unfavorable opinion of plaintiff in the minds of tradespeople, businesses and the public generally.

67. Defendant's publication of the above defamatory statements were wilful, malicious, reckless, in bad faith and intentional and done for the purpose of harassing, vexing, annoying and injuring the reputation of plaintiff.

68. Defendant's conduct was willful, malicious, oppressive and fraudulent, and undertaken with willful disregard for plaintiff's rights.

69. As a result of the foregoing actions committed by defendant, plaintiff has been damaged by not less than fifty million dollars ($50,000,000.00).

WHEREFORE, Plaintiff demands judgment against the defendants for damages in excess of fifty million dollars, breach of contract damages, unliquidated damages, liquidated damages, compensatory damages, special damages, general damages, exemplary damages, punitive damages, litigation costs, attorneys fees and such equitable and legal relief as this Court deems just and proper in the circumstances.

COUNT SEVEN

(Intentional Interference With Prospective Economic Advantage Under State and Federal Common Law)

70. Plaintiff repeats and realleges paragraphs one (1) through sixty-nine (69) as if the same were set forth at length herein.

71. Plaintiff has enjoyed business relationships with their customers that have resulted in numerous financial benefits to plaintiff.

72. Defendant knew of plaintiff's business relationship with their customers.

73. Plaintiff had reasonable and justifiable expectations that they would continue to enjoy business relationships with said customers that would result in even more financial benefits to plaintiff in the future.

74. Plaintiff had reasonable expectations that it would develop new business relationships with prospective customers that would result in economic benefits for plaintiff.

75. Plaintiff had a strong economic interest in having its expectations of benefits from these existing and prospective relationships come to fruition.

76. Defendant unlawfully interfered with plaintiff's interest in these prospective economic advantages.

77. Defendant utilized an unlawful pattern of fraud and intimidation to wrest plaintiff's customers away and deny plaintiff any future economic advantage from said relationships, and preclude plaintiff's development of further economic benefits.

78. Specifically:

a. Defendant utilized fraudulent billing practices to intimidate plaintiff's customers into participating in defendant's plan of damaging plaintiff's economic interests;

b. Defendant offered telephone usage rates to plaintiff's customers

which were lower than those offered by plaintiff to its customers;

c. Defendant solicited plaintiff's customers without permission and used proprietary information of plaintiff, said information consisting of plaintiff's customer lists;

d. Defendant failed to delete certain customer accounts despite plaintiff's request to do so;

e. Defendant billed plaintiff's customers for "shortfall" charges even though said customers were not liable for said charges;

f. Defendant failed to send any billing invoices to plaintiff for any "shortfall" charges concerning plaintiff's customers;

g. Defendant told plaintiff's customers that plaintiff refused to pay for any "shortfall" charges billed to said customers;

h. Defendant told plaintiff's customers that plaintiff could not be trusted at running a business;

i. Defendant told plaintiff's customers that plaintiff was the cause for, and/or had requested that defendant place the "shortfall" charges on said customers' bills;

j. Defendant limited the availability of new eight hundred (800) numbers to plaintiff, thereby limiting plaintiff's ability to obtain new customers;

k. Defendant failed to change the existing contract to a new plan, Tariff 516.

79. Defendant utilized plaintiff's proprietary customer information, which was entrusted to defendant in strictest confidence for billing and provisioning purposes only, to contact plaintiff's customers, disparage plaintiff and attempt to convert said customers to defendant.

80. As a result of defendant's knowingly fraudulent representations, plaintiff's customer's were intimidated into not only ceasing use of plaintiff's services, but charging plaintiff with unauthorized switching from their alleged carrier of choice.

81. This malicious interference by defendant with plaintiff's prospective economic interests was designed not only to profit defendant, but also to do irreparable damage to plaintiff's interests.

82. The acts described above were done with the intention of wrongfully influencing potential and actual customers of plaintiff to forego business relationships with plaintiff and to enter into relationships with defendant, as well as the eventual destruction of plaintiff's business.

83. Defendant's actions were transgressive of generally accepted standards of decency and ethics in the conduct of business and served no justifiable purpose.

84. Defendant was unjustly enriched as a result of its injurious actions.

85. But for the unjust and unlawful interference of defendant, there was a very reasonable probability that plaintiff would continue to have lucrative business relationships with their existing customers and developed other profitable business relationships with new customers.

86. Defendant's conduct was willful, malicious, oppressive and fraudulent, and undertaken with wilful disregard for plaintiff's rights.

87. As a result of the foregoing actions committed by defendant, plaintiff has been damaged by not less than fifty million dollars ($50,000,000.00).

WHEREFORE, Plaintiff demands judgment against the defendants for damages in excess of fifty million dollars, breach of contract damages, unliquidated damages, liquidated damages, compensatory damages, exemplary damages, special damages, general damages, punitive damages, litigation costs, attorneys fees and such equitable and legal relief as this Court deems just and proper in the circumstances.

COUNT EIGHT

(Intentional Interference with Contractual Relations Under State and Federal Common Law)

88. Plaintiff repeats and realleges paragraphs one (1) through eighty-seven (87) as if the same were set forth at length herein.

89. Plaintiff has enjoyed contractual relationships with its customers that have resulted in numerous financial benefits to plaintiff.

90. Plaintiff had a strong economic interest in maintaining these contractual relationships.

91. Defendant was aware of the contractual relationships plaintiff had with its customers.

92. Defendant was not a party to any of the contracts between plaintiff and plaintiff's customers. Defendant was merely a third party.

93. Defendant intentionally and unlawfully interfered with plaintiff's contractual relationships with its customers.

94. Defendant utilized an unlawful pattern of fraud and intimidation to wrest plaintiff's customers away.

95. Specifically:

a. Defendant utilized fraudulent billing practices to intimidate plaintiff's customers into participating in defendant's plan of damaging plaintiff's economic interests;

b. Defendant offered telephone usage rates to plaintiff's customers which were lower than those offered by plaintiff to its customers;

c. Defendant solicited plaintiff's customers without permission and used proprietary information of plaintiff, said information consisting of plaintiff's customer lists;

d. Defendant failed to delete certain customer accounts despite plaintiff's request to do so;

e. Defendant billed plaintiff's customers for "shortfall" charges even though said customers were not liable for said charges;

f. Defendant failed to send any billing invoices to plaintiff for any "shortfall" charges concerning plaintiff's customers;

g. Defendant told plaintiff's customers that plaintiff refused to pay for any "shortfall" charges billed to said customers;

h. Defendant told plaintiff's customers that plaintiff could not be trusted at running a business;

i. Defendant told plaintiff's customers that plaintiff was the cause for, and/or had requested that defendant place the "shortfall" charges on said customers' bills;

j. Defendant limited the availability of new eight hundred (800) numbers to plaintiff, thereby limiting plaintiff's ability to obtain new customers;

k. Defendant failed to change the existing contract to a new plan, Tariff 516.

96. Defendant utilized plaintiff's proprietary customer information, which was entrusted to defendant in strictest confidence for billing and provisioning purposes only, to contact plaintiff's customers, disparage plaintiff and attempt to convert said customers to defendant.

97. As a result of defendant's knowingly fraudulent representations, plaintiff's customer's were intimidated into not only ceasing use of plaintiff's services, but charging plaintiff with unauthorized switching from their allege carrier of choice.

98. This malicious interference by defendant with plaintiff's contractual relations were designed not only to profit defendant, but also to do irreparable damage to plaintiff's interests.

99. The acts described above were done with the intention of wrongfully influencing actual customers of plaintiff to forego business relationships with plaintiff and to enter into relationships with defendant, as well as the eventual destruction of plaintiff's business.

100. Defendant's actions were transgressive of generally accepted standards of decency and ethics in the conduct of business and served no justifiable purpose.

101. Defendant was unjustly enriched as a result of its injurious actions.

102. But for the unjust, unlawful, intentional and malicious interference of defendant, there was a very reasonable probability that plaintiff would continue to have lucrative business relationships with their existing customers.

103. Defendant's conduct was willful, malicious, oppressive and fraudulent, and undertaken with wilful disregard for plaintiff's rights.

104. As a result of the foregoing actions committed by defendant, plaintiff has been damaged by not less than fifty million dollars ($50,000,000.00).

WHEREFORE, plaintiff demands judgment against the defendants for damages in excess of fifty million dollars, breach of contract damages, unliquidated damages, liquidated damages, compensatory damages, exemplary damages, special damages, general damages, punitive damages, litigation costs, attorneys fees and such equitable and legal relief as this Court deems just and proper in the circumstances.

COUNT NINE

(Unfair Competition/Trade Libel Under State and Federal Common Law)

105. Plaintiff repeats and realleges paragraphs one (1) through one hundred-four (104) as if the same were set forth at length herein.

106. Defendant's actions and statements, heretofore described, represent unlawful communication of false statements to third persons concerning plaintiff, and how plaintiff conducts business.

107. Said actions and statements of defendant falsely and unduly disparaged plaintiff's product, i.e. plaintiff's telecommunications services, and gravely injured plaintiff's business and proprietary rights.

108. Defendant's publication of matters false and derogatory of plaintiff's business to existing and prospective customers were calculated to prevent said customers from dealing with plaintiff.

109. Defendant's defamatory and disparaging statements concerning plaintiff's trade damaged plaintiff by causing existing customers to discontinue their business relationship with plaintiff and handicapping plaintiff's efforts in developing new business relationships.

110. The damages incurred by plaintiff greatly affected its business and its right to earn a living.

111. The statements and actions of defendant also constituted an unlawful and unfair mode of competition.

112. Defendant utilized unlawful means of fraudulent representation and intimidation to damage plaintiff's business.

113. The actions of defendant violated established business ethics and customs and were transgressive of generally accepted standards of morality.

114. Defendant falsely and excessively charged plaintiff's customers to intimidate them into becoming customers of defendant, and disparaged and defamed plaintiff and its business.

115. Plaintiff suffered, and continues to suffer, serious damages due to defendant's defamatory and disparaging actions which constituted unfair competition.

116. Defendant's conduct was willful, malicious, oppressive and fraudulent, and undertaken with wilful disregard for plaintiff's rights.

117. As a result of the foregoing actions committed by defendant, plaintiff has been damaged by not less than fifty million dollars ($50,000,000.00).

WHEREFORE, plaintiff demands judgment against the defendants for damages in excess of fifty million dollars, breach of contract damages, unliquidated damages, liquidated damages, compensatory damages, exemplary damages, special damages, general damages, punitive

damages, litigation costs, attorneys fees and such equitable and legal relief as this Court deems just and proper in the circumstances.

COUNT TEN

(Violation of the New Jersey Consumer Fraud Act, N.J.S. §§ 56:-1, et seq.)

118. Plaintiff repeats and realleges paragraphs one (1) through one hundred-seventeen (117) as if the same were set forth at length herein.

119. The affirmative and knowing actions, use and employment by defendant of the unconscionable commercial practices, deception, fraud, false pretense, false promise and misrepresentation as set forth, and its affirmative and knowing concealment, suppression and/or omission of material facts with intent to induce reliance thereon in connection with its services, constitute a violation of the New Jersey Consumer Fraud Act, N.J.S. §§56:8-1, et seq.

120. By reason of the unconscionable and fraudulent activities of defendant as set forth herein, plaintiff has suffered damages.

121. Defendant's conduct was willful, malicious, oppressive and fraudulent, and undertaken with wilful disregard for plaintiff's rights.

122. As a result of the foregoing actions committed by defendant, plaintiff has been damaged by not less than fifty million dollars ($50,000,000.00).

WHEREFORE, plaintiff demands judgment against the defendants for damages in excess of fifty million dollars, breach of contract damages, unliquidated damages, liquidated damages, compensatory damages, exemplary damages, special damages, general damages, punitive damages, litigation costs, attorneys fees and such equitable and legal relief as this Court deems just and proper in the circumstances.

damages, litigation costs, attorneys fees and such equitable and legal relief as this Court deems just and proper in the circumstances.

COUNT TEN

(Violation of the New Jersey Consumer Fraud Act, N.J.S. §§ 56:-1, et seq.)

118. Plaintiff repeats and realleges paragraphs one (1) through one hundred-seventeen (117) as if the same were set forth at length herein.

119. The affirmative and knowing actions, use and employment by defendant of the unconscionable commercial practices, deception, fraud, false pretense, false promise and misrepresentation as set forth, and its affirmative and knowing concealment, suppression and/or omission of material facts with intent to induce reliance thereon in connection with its services, constitute a violation of the New Jersey Consumer Fraud Act, N.J.S. §§56:8-1, et seq.

120. By reason of the unconscionable and fraudulent activities of defendant as set forth herein, plaintiff has suffered damages.

121. Defendant's conduct was willful, malicious, oppressive and fraudulent, and undertaken with wilful disregard for plaintiff's rights.

122. As a result of the foregoing actions committed by defendant, plaintiff has been damaged by not less than fifty million dollars ($50,000,000.00).

WHEREFORE, plaintiff demands judgment against the defendants for damages in excess of fifty million dollars, breach of contract damages, unliquidated damages, liquidated damages, compensatory damages, exemplary damages, special damages, general damages, punitive damages, litigation costs, attorneys fees and such equitable and legal relief as this Court deems just and proper in the circumstances.

COUNT ELEVEN

(Discrimination and Unreasonable and Unjust Practices by a Common Carrier in violation of 47 U.S.C. §§ 201 and 202)

123. Plaintiff repeats and realleges paragraphs one (1) through one hundred twenty-two (122) as if the same were set forth at length herein.

124. Defendant is a "common carrier" pursuant to 47 U.S.C. § 153(h).

125. In violation of 47 U.S.C. §§ 201 and 202, defendant has unjustly and unreasonably discriminated against plaintiff by, among other things, providing plaintiff with less favorable charges, practices, classifications, regulations, facilities and services than those provided to defendant's non-reseller commercial customers. Moreover, in violation of 47 U.S.C. §§ 201 and 202, defendant has intentionally subjected plaintiff to undue practices, prejudice and disadvantage.

126. Defendant's conduct was willful, malicious, oppressive and fraudulent, and undertaken with wilful disregard for plaintiff's rights.

127. As a result of the foregoing actions committed by defendant, plaintiff has been damaged by not less than fifty million dollars ($50,000,000.00).

WHEREFORE, plaintiff demands judgment against the defendants for damages in excess of fifty million dollars, breach of contract damages, unliquidated damages, liquidated damages, compensatory damages, exemplary damages, special damages, general damages, punitive damages, litigation costs, attorneys fees and such equitable and legal relief as this Court deems just and proper in the circumstances.

COUNT TWELVE

(Violation of 47 U.S.C. §§ 201-203 and State and Federal Contract Law)

128. Plaintiff repeats and realleges paragraphs one (1) through one hundred twenty-seven (127) as if the same were set forth at length herein.

129. Plaintiff has complied with all conditions precedent of its agreement with defendant.

130. Defendant has violated the provisions of 47 U.S.C. §§ 201, 202 and 203, to include 203(c), AT&T's F.C.C. Tariff No. 2., and the contract obligations imposed on it by state and federal contract law, including the obligation of good faith and fair dealing, by among other things, (i) providing inaccurate and misleading billing for plaintiff's customers, (ii) failing to account for monies collected from plaintiff's customers, (iii) making improper deductions from remittances, (iv) wrongfully withholding commission payments, (v) conducting its relationship with plaintiff in a manner that defendant knew, or should have known, would prevent plaintiff from fulfilling tariff commitments and being able to aggregate defendant's 800 services, (vi) refusing to enter into contract tariffs with plaintiff directly and, (vii) refusing to permit plaintiff to transfer traffic to Contract Tariff 516.

131. Defendant's conduct was willful, malicious, oppressive and fraudulent, and undertaken with wilful disregard for plaintiff's rights.

132. As a result of the foregoing actions committed by defendant, plaintiff has been damaged by not less than fifty million dollars ($50,000,000.00).

WHEREFORE, plaintiff demands judgment against the defendants for damages in excess of fifty million dollars, breach of contract damages, unliquidated damages, liquidated damages,

compensatory damages, exemplary damages, special damages, general damages, punitive damages, litigation costs, attorneys fees and such equitable and legal relief as this Court deems just and proper in the circumstances.

DAMAGES

WHEREFORE, plaintiff demands judgment against defendant for

1. damages in excess of fifty million dollars;
2. breach of contract damages;
3. unliquidated damages;
4. liquidated damages;
5. compensatory damages;
6. exemplary damages;
7. punitive damages;
8. general damages;
9. special damages;
10. litigation costs;
11. attorneys fees; and
12. such equitable and legal relief as this Court deems just and proper in the circumstances.

CERTIFICATION PURSUANT TO LOCAL CIVIL RULE 11.2

The matter in controversy is not the subject of any other action pending in any court, or any pending arbitration or administrative proceeding.

THE LAW OFFICES OF LAWRENCE S. COVEN

BY: _____
LAWRENCE S. COVEN(L.S.C. 9572)
DATED: 4/3/98